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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019). Unpublished cases appear in *Italics*.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EAMON ALBERT FECTEAU, PLAINTIFF
v.
ELIZABETH SPIERER, DEFENDANT
v.
LARRY SPIERER, AND PEARL JOSEPHINE SPIERER, INTERVENORS

No. COA20-532

Filed 20 April 2021

1. Child Custody and Support—custody modification—findings regarding parents' fitness—improper consideration—immaterial to overall determination

In a custody matter in which the trial court changed custody of the minor child from the child's maternal grandparents to the child's father based on a substantial change in circumstances, the court's consideration of the lack of findings in the initial custody order regarding whether the parents were unfit or had acted in a manner inconsistent with their constitutionally-protected rights as parents, although not a proper consideration for custody modification, did not affect the overall correctness of the court's determination under N.C.G.S. § 50-13.7(a). The improper findings were immaterial to the court's conclusions that modification was warranted and was in the child's best interest, which were otherwise supported by ample findings.

2. Child Custody and Support—custody modification—substantial change in circumstances—sufficiency of findings

The trial court's decision to modify custody, from the minor child's maternal grandparents to the child's father, was supported by ample unchallenged findings of fact regarding various improvements

in the father's housing, employment, and ability to provide health insurance, and the bond between the father's new wife and stepchild with the minor child. Those findings, in turn, supported the court's conclusions that there was a substantial change in circumstances affecting the welfare of the child which warranted modification and that modification was in the child's best interest.

Appeal by intervenors from order entered 20 December 2019 by Judge Sherri W. Elliott in Catawba County District Court. Heard in the Court of Appeals 24 March 2021.

Wesley E. Starnes, PC, by Wesley E. Starnes, for Intervenors-Appellants.

Helton, Cody, & Associates, PLLC, by Blair E. Cody, III, for Plaintiff-Appellee.

No brief filed for Defendant.

CARPENTER, Judge.

¶ 1 Larry Spierer and Pearl Josephine Spierer ("Intervenors"), maternal grandparents to minor child R.F., appeal from a custody modification order, which granted primary physical and legal custody to Eamon Albert Fecteau ("Plaintiff"), R.F.'s father; secondary physical custody and visitation to Intervenors; and supervised visitation to Elizabeth Spierer ("Defendant"), R.F.'s mother. We find no abuse of discretion by the trial court in entering the modification order; therefore, we affirm.

I. Factual & Procedural Background

¶ 2 The uncontroverted evidence presented at trial tends to show the following: Plaintiff and Defendant married on 10 May 2014 and separated on 4 July 2015. Plaintiff and Defendant share one child together, R.F., who was born on 16 July 2013—prior to the parties' marriage. Defendant has two other children by two different fathers; she has custody of her youngest daughter while Intervenors have custody of her oldest child, a son. On 31 October 2016, Plaintiff filed a complaint for custody, equitable distribution, and absolute divorce. On 21 November 2016, Intervenors filed a motion to intervene on the issue of custody in the pending matter. On 2 February 2017, the trial court entered an order allowing the intervention. On the same day, Intervenors filed an answer and a counterclaim for child custody.

¶ 3 Following a hearing, the trial court entered a temporary custody order granting Intervenors "custody, care and control of [R.F.] until further order of the Court." On 19 July 2017, the trial court entered a consent order based on a memorandum of order filed on 19 July 2017, granting primary physical and legal custody of R.F. to Intervenors and secondary physical custody to Plaintiff. On 26 March 2018, Plaintiff filed a motion for modification of child custody, and then filed an amended motion to modify child custody on 5 March 2019. Plaintiff sought primary physical custody and joint legal custody with Defendant. In his amended motion, he alleged there had a been a substantial change of circumstances affecting the child's well-being and the modification was in the best interest of the minor child.

¶ 4 On 13 March 2019 and 17 July 2019, hearings were held before the presiding judge, the Honorable Sherri W. Elliott. On 20 December 2019, Judge Elliott entered a modification order in which she granted primary physical custody of R.F. to Plaintiff, secondary custody and visitation to Intervenors, and visitation to Defendant under the supervision of Intervenors. On 16 January 2020, Intervenors filed a timely written notice of appeal from the modification order.

II. Jurisdiction

¶ 5 We first address Intervenors' improper citation to N.C. Gen. Stat. § 7A-27 (2019) in their statement of the grounds for appellate review. They rely on subsection (c) of Chapter 7A, Section 27 as authority for their appeal of this case. However, N.C. Gen. Stat. § 7A-27(c) was repealed effective 23 August 2013; therefore, Intervenors have not provided an adequate "citation of the statute . . . permitting appellate review" pursuant to the North Carolina Rules of Civil Procedure. N.C. R. App. P. 28(b)(4).

¶ 6 Our Supreme Court has confirmed that "compliance with the Rules is required"; however, it has also clarified that not every violation of the Rules warrants automatic dismissal—particularly when the "violations do not impede comprehension of the issues or frustrate the appellate process." *State v. Hart*, 361 N.C. 309, 311, 313 644 S.E.2d 201, 202–03 (2007) (citations and quotations omitted); *see State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258 (2007) (allowing appellate review despite the appellant's minor violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure for citing to the transcripts rather than the record in referring to assignments of error). Furthermore, Rule 2 allows for the Court's suspension or variation of the appellate rules in

cases pending in the Court so as "[t]o prevent manifest injustice to a party . . . ." N.C. R. App. P. 2.

¶ 7 Here, Intervenors incorrectly cite to the repealed subsection (c) of N.C. Gen. Stat. § 7A-27 rather than N.C. Gen. Stat. § 7A-27(b)(2). Considering that this error is minor, and Intervenors' intent to cite to the subsection allowing an appeal of right from a final judgment of a district court opinion is apparent, an automatic dismissal of this case is not proper. Furthermore, the error does not interfere with the Court's comprehension of the issues of the case or frustrate the appellate process; therefore, we allow the appeal. *See Hart*, 361 N.C. at 311, 313 644 S.E.2d at 202–03.

III. Issues

¶ 8 The issues on appeal are whether: (1) the trial court erred by finding as fact in its modification order that the initial custody order had lacked findings of fact with respect to whether Plaintiff or Defendant are unfit or have acted inconsistently with their constitutionally-protected right as parents; (2) the trial court's findings of fact and conclusions of law are sufficient to support its order modifying child custody based on a substantial change in circumstances affecting the welfare of the child.

IV. Analysis

¶ 9 On appeal, Intervenors contend that the trial court erred in modifying the 19 July 2017 consent order because (1) it improperly "consider[ed] the lack of a prior finding of fact" regarding Plaintiff's and Defendant's constitutionally-protected status as parents and (2) entered the modification to the consent order where the "competent evidence does not support a finding of fact or conclusion of law that there was a substantial change of circumstances affecting the welfare of the minor child . . . ." We disagree.

A. Standard of Review

¶ 10 "It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). Accordingly, we review the trial court's determination of a motion to modify custody for an abuse of discretion. *Id.* at 625, 501 S.E.2d at 902.

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine

> whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> . . . .
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interest. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its discretion to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003) (citations and quotations omitted).

B. Absence of Findings of Fact in Initial Custody Order

¶ 11 **[1]** In their first argument, Intervenors contend that the trial court erred by considering the absence of findings of fact in the initial custody order regarding whether Plaintiff and Defendant are unfit or have acted in a manner inconsistent with their constitutionally-protected right as parents to custody, care, and control of their minor child. In doing so, Intervenors essentially argue that the trial court failed to follow the precedent established in *Bivens v. Cottle*, 120 N.C. App. 467, 469, 462 S.E.2d 829, 831 (1995), which held that the *Petersen* presumption in favor of a natural parent does not apply to a custody modification proceeding. In contrast, Plaintiff asserts that since the trial court did not make any "findings of fact [ ]or conclusions of law that the evidence, as it relates to either parents' constitutionally protected status, was [based on] clear, cogent and convincing evidence," the trial court "did not improperly consider" such an absence of findings in the initial order. After careful

review of the record, we conclude that findings of fact 99, 100, and 101 are unnecessary for our review of the modification order in the case *sub judice*; therefore, we do not reach the merits of the parties' arguments with respect to these findings.

¶ 12 In *Petersen v. Rogers*, this Court held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount rights of parents to custody, care, and control of their children must prevail" over non-natural parents. 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994). Subsequently, *Bivens v. Cottle* limited the *Petersen* standard to only initial custody proceedings and rejected its application to custody modification orders. *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831; *see also Lambert v. Riddick*, 120 N.C. App. 480, 482–83, 462 S.E.2d 835, 836 (1995). To modify custody orders, a party must follow the statutory requirements set forth in N.C. Gen. Stat. § 50-13.7(a). Accordingly, a trial court must "determine[ ] that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831 (citations omitted); *see also* N.C. Gen. Stat. § 50-13.7(a) (2019). Thus, in a custody modification proceeding, a fit parent who has not neglected the welfare of his or her children does not enjoy the same right to custody superior to that of a non-parent as the fit parent would possess in an initial custody proceeding. *Bivens*, 120 N.C. App. at 470, 462 S.E.2d at 831. "To hold otherwise, would ease the burden of proof on a parent in a modification proceeding who had lost custody to a non-parent in a prior proceeding." *Brewer v. Brewer*, 139 N.C. App. 222, 230, 533 S.E.2d 541, 548 (2000).

¶ 13 In *Bivens*, the trial court awarded custody of the parties' children to the maternal grandparents, despite the trial court finding as fact that the children's mother "was a fit and proper person to have [ ] primary custody, care and control of the minor children." *Bivens*, 120 N.C. App. at 468, 462 S.E.2d at 830. The mother did not appeal from or challenge the initial custody order. *Id.* at 469, 462 S.E.2d at 830. Relying on the *Petersen* presumption, she subsequently filed a motion to modify the custody order, arguing that she was not required to show a substantial change in circumstances as a natural parent since the trial court was mandated to award her custody over the non-parents. *Id.* at 468, 462 S.E.2d at 830. The trial court awarded the mother custody despite her insufficient showing of changed circumstances. *Id.* at 468, 462 S.E.2d at 830. The grandparents appealed from the trial court's order, and this Court reversed the judgment, holding that the modification was improperly entered. *Id.* at 468, 462 S.E.2d at 830.

¶ 14 In this case, Plaintiff consented to a custody order in which third-party Intervenors were awarded primary physical and legal custody of his minor child, and he was awarded secondary physical custody. Neither Plaintiff nor Intervenors appealed from or otherwise objected to the consent order. Subsequent to the filing of the consent order, Plaintiff filed a motion for modification of child custody, as well as an amended motion to modify child custody in which he sought primary physical custody and joint legal custody with Defendant. In both motions, Plaintiff alleged a substantial change in circumstances warranting the modification to the custody order. The trial court, after considering the changed circumstances, awarded Plaintiff primary legal and physical custody of R.F.

¶ 15 Although the case at bar shares some factual similarities with *Bivens*, we are not persuaded by Intervenors' argument that *Bivens* compels this Court to reverse the 20 December 2019 custody order. In comparing this case and *Bivens*, it is clear that in both cases: the grandparents were awarded child custody over the natural parents; the natural parents did not object to or appeal from the custody orders; subsequently, a natural parent in each case moved to modify the order; and the natural parents were awarded custody following their motions. In *Bivens*, this Court held that the natural parent was not entitled to custody because she failed to meet her burden in showing changed circumstances and was awarded custody erroneously based on an improper application of the *Petersen* presumption. Conversely, here, Plaintiff put forth substantial evidence of changed circumstances and did not argue that he was entitled to custody over third parties based on his constitutionally-protected status as a natural parent. Although counsel for Plaintiff concedes that it misstated a fact from *Bivens* at the 17 July 2019 hearing by stating that the natural parent seeking to modify the custody order in that case "had a finding of unfitness inconsistent with the Constitution of protected rights," Intervenors merely speculate on appeal with regard to the trial court's application of the *Petersen* standard and the trial court's reliance on Plaintiff's counsel's statement in entering its order. Furthermore, Intervenors contend in their brief that "[t]he proper avenue [for modifying the custody order] would have been to . . . file a motion in the cause alleging a substantial change of circumstance, without considering the constitutional right to parent the child." Based on the record, Plaintiff has done exactly that—he filed two motions alleging a substantial and material change in circumstances without raising his constitutional rights as a natural parent.

¶ 16 Intervenors point to the trial court's findings of fact 99, 100, and 101 to assert that the trial court entered its modification order in part based

on the initial custody order's lack of findings of fact as to the natural parents' fitness or constitutionally protected status as parents. Intervenors challenge the following findings of fact:

> 99. There are no findings in any order in this file that the Plaintiff is unfit and/or has acted inconsistent with his constitutionally protected rights to parent / raise his child.
>
> 100. There are no findings in any order in this file that the Defendant is unfit and/or has acted inconsistent with her constitutionally protected rights to parent / raise her child.
>
> 101. The Defendant's choices and instability before and since the entry of the prior Order constitute acting in a manner inconsistent with her constitutionally protected status.

¶ 17 In this case, findings of fact numbers 99 and 100 reference the lack of findings in the prior order with regard to the parents' fitness and constitutionally-protected status, and finding of fact 101 relates to Defendant's conduct prior to and subsequent to the entry of the consent order. In light of our holding in *Bivens* that the *Petersen* presumption is inapplicable to a modification of a child custody order, findings of fact 99, 100, and 101 are unnecessary to our review of the modification order. *See Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 830. Furthermore, these findings were unnecessary to support the trial court's conclusions of law 2 and 3 that (a) "[t]here has been a substantial change in circumstances since the entry of the current order affecting the welfare of the minor child" and that (b) "[t]he best interest of the minor child would be for the Court to modify the current custody order." The aforementioned conclusions of law together with the trial court's ample findings of fact to support these conclusions satisfy the statutory requirements under N.C. Gen. Stat. § 50-13.7(a) for a modification of a custody order. Therefore, the trial court did not err in including findings of fact 99, 100, and 101 in its modification order because these factual findings were immaterial to the trial court's determination of whether Plaintiff had made a "showing of changed circumstances" as statutorily required. *See* N.C. Gen. Stat. § 50-13.7(a).

C. Substantial Change in Circumstances

¶ 18 **[2]** In their second argument, Intervenors contend that the findings of fact in the modification order are not supported by competent evidence

showing a substantial change in circumstances affecting the welfare of the minor child. We disagree.

¶ 19 The modification of a child custody order is governed by N.C. Gen. Stat. § 50-13.7. The statute provides: "an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in this cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of [N.C. Gen. Stat. §] 50-13.10." N.C. Gen. Stat. § 50-13.7(a).

¶ 20 "[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) (citations omitted). "Where no exception is taken to a finding of fact [made] by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Berry v. Berry*, 257 N.C. App. 408, 414, 809 S.E.2d 908, 912 (2018) (citation omitted). The effects of the substantial change in circumstances may be self-evident or may be proved by a "showing of evidence *directly* linking the change to the welfare of the child." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256 (emphasis in original).

¶ 21 On appeal, Intervenors challenge only finding of fact 103. The trial court's remaining one hundred and three findings of fact are uncontested; thus, are presumed to be supported by competent evidence. *Berry*, 257 N.C. App. at 414, 809 S.E.2d at 912. Finding of fact 103 summarizes the basis for the trial court's conclusion that a substantial change in circumstances affecting the welfare of the minor child occurred:

> 103. [t]here have been substantial changes in circumstances since the entry of the current order. Those circumstances include the minor child starting school, the Plaintiff getting married and moving into a new home with his wife, step-son, and minor child, the Defendant enrolling in in-patient rehab in Texas for her drug addiction, the Defendant's unemployment, the Defendant giving birth to another child, the Plaintiff's change in employment wherein he now has employer provided health insurance for his family and paid vacation time, the minor child's relationship with her step-brother [J.E.] and her step-mother Kelsey.

¶ 22 We first examine the trial court's finding of fact 103 to determine whether it is supported by substantial evidence. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

¶ 23 Following two hearings, the trial court made the following pertinent findings of fact, *inter alia*, in support of its determination that a substantial change in circumstances had occurred that warranted modification of the consent order:

> 12. Since the entry of the prior order the Plaintiff has remarried and is currently living with his wife, Kelsey Fecteau . . . in an approximate 1,500 square foot home with 3 bedrooms, 2 full bathes on approximately a ¼ acre in the cul-de-sac of a quiet neighborhood. The Plaintiff and his wife are leasing the residence with an option to buy.
>
> . . . .
>
> 15. The Plaintiff has a step-son as a result of his marriage to Kelsey, said child being [J.E.] . . . who is 5 years of age. [J.E.] lives with the Plaintiff and Kelsey on a full-time basis. [J.E.] is the same age and in the same grade at school as his step-sister, [R.F.], who is the subject of this action.
>
> . . . .
>
> 20. [R.F.] and [J.E.] have bonded and have a close loving relationship. They share some toys and frequently play together when they are both in the Plaintiff's home.
>
> . . . .
>
> 24. Kelsey feels as though [R.F.] is very much a part of their family, and the four of them complete their family unit.
>
> . . . .
>
> 26. The Plaintiff presented photographs of his current home which is a fit and appropriate residence for the minor child, [R.F]. Said residence is appropriately appointed and well maintained.
>
> . . . .
>
> 30. The Plaintiff and his family regularly attend Hickory Church of Christ. The Plaintiff and his family are active in the church. [J.E.] and [R.F]

and involved in the "kingdom kids" program at the church. [R.F.] is not able to be as involved in certain activities / programs at the church as [J.E.] because of the lack of custodial time with the Plaintiff.

31. [J.E.] and [R.F.] have formed a close brother / sister relationship during the marriage of the Plaintiff and Kelsey.

. . . .

37. [R.F.] is currently not involved in any extra-curricular activities when she is with the Intervenors. The Plaintiff is currently not able to enroll [R.F.] in cheerleading or Scouts based on the current custody schedule and his custodial time.

. . . .

39. The Plaintiff has Blue Cross Blue Shield health insurance through his employer. The Plaintiff currently carries health insurance on his wife, Kelsey, and both [J.E.] and [R.F.]. The Plaintiff did not have health insurance available through his former employer at the time the current order was entered.

. . . .

41. The minor child [R.F.] prefers to share a bedroom with her step-brother [J.E.], even though there is a third bedroom.

. . . .

45. Since the entry of the current order, the Defendant has had a third child, by another man. The Defendant has 3 children with 3 different men. The Plaintiff is the only father of the Defendant's children who was married to the Defendant.

. . . .

58. Since the entry of the current order, the Defendant attended out-patient drug rehab in Texas. The Defendant also stayed at a pregnancy care center / adoption center while in Texas.

. . . .

> 61. The Defendant is currently unemployed. She last worked at Wal-Mart but was relieved of that employments [sic] for missing work.
>
> . . . .
>
> 104. This Order will serve the overall benefit of the minor child.

¶ 24 Intervenors did not challenge findings of fact 12, 15, 20, 24, 26, 30, 31, 37, 39, 41, 45, 58, 61 or 104; thus, these findings are presumed to be supported by competent evidence and are binding on this Court on appeal. *See Berry*, 257 N.C. App. at 414, 809 S.E.2d at 912. Findings of fact 12, 15, 20, 24, 26, 30, 31, 37, 39, 41, 45, 58, 61 and 104 provide ample support for finding of fact 103; therefore, we conclude finding of fact 103 was supported by competent, substantial evidence.

¶ 25 Next, we determine whether the trial court's findings of fact support its conclusions of law. *See Shipman*, 357 N.C. at 474, 586 S.E.2d 253. Intervenors take exception to one conclusion of law, conclusion of law 2, as not being "supported by findings of fact or competent evidence," although they fail to explain their argument in their appellate brief. We disagree with Intervenor's contention that conclusion of law 2 is not supported by competent evidence.

¶ 26 Conclusion of law 2 states: "There has been a substantial change in circumstances since the entry of the current order affecting the welfare of the minor child." The modification order contained numerous unchallenged findings of fact to support the trial court's legal conclusion that a substantial change in circumstances had occurred since the 19 July 2017 consent order was entered, which affected the welfare of R.F.

¶ 27 We next consider whether the trial court erred in finding a substantial change in circumstances to warrant a modification to the trial court's prior custody order. *See Shipman*, 357 N.C. at 481, 586 S.E.2d 257. "[T]he trial judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral, and spiritual faculties." *Blackley*, 285 N.C. at 362, 204 S.E.2d at 680 (citations omitted). "[C]ourts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899. A modification of custody may be supported by either positive or negative changes. *Id.* at 620, 501 S.E.2d at 900.

¶ 28 Intervenors argue that the trial court's findings with respect to Plaintiff's change in residence, remarriage, and new employment as well as the minor child's starting school were insufficient to show that a substantial change in circumstances occurred to modify the consent order or that the changes affected the welfare of the child. Intervenors contend multiple times in their brief that the trial court erred in modifying the custody order because it failed to "engage in the necessary comparison of Plaintiff's circumstances with those of Intervenors." However, this is not the standard by which the Courts in North Carolina determine child custody, although a comparison between the circumstances of the parties may be appropriate in limited scenarios. *See*, *e.g.*, *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954) (stating that the trial court must make a "comparison[ ] between the two applicants upon consideration of all relevant factors, which of the two is best-fitted to give the child the home-life, care, supervision that will be most conducive to its well-being" in considering the relocation of a minor child to another state in a custody dispute); *see also Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000). Rather, in *Pulliam*, our Supreme Court interpreted N.C. Gen. Stat. § 50-13.7 to mean that the mandated "showing of changed circumstances" must be, or are likely to be impactful on the minor child. *See Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900; *see also* N.C. Gen. Stat. § 50-13.7(a).

¶ 29 Furthermore, Intervenors assert that Defendant's enrollment in drug rehabilitation, her unemployment, and her giving birth to a third child do not support the trial court's findings of a substantial change in circumstances. We disagree; the trial court did not consider Plaintiff's new residence, employment, remarriage or R.F.'s starting of school as sole, standalone factors in concluding there had been a substantial change in circumstances—rather, each factor was but one of several factors that the trial court utilized in its analysis to reach the decision to modify the custody order.

¶ 30 In this case, the effects of the substantial change in circumstances were self-evident on the minor child's welfare; thus, evidence directly linking the changes and the welfare of R.F. was not required. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. There were numerous substantial changes in circumstances that had an obvious positive impact on R.F.'s welfare including: Plaintiff's new employment which provided health insurance, paid vacation, and more flexibility; Plaintiff's new three-bedroom home; R.F. entering a new stage in life by beginning first grade with her stepbrother; Plaintiff marrying his girlfriend, Kelsey; and R.F.'s close relationships with Kelsey and her stepbrother of the same

age and grade. Based on these factual findings, Plaintiff's living situation, home life, and his ability to care and provide for R.F. had changed substantially since the 19 July 2017 consent order was entered. *See Metz v. Metz*, 138 N.C. App. 538, 530 S.E.2d 79 (2000) (affirming there was a substantial change in circumstances based on the father's "reformed lifestyle" as opposed to adverse changes in the mother's lifestyle); *Deanes v. Deanes*, 269 N.C. App. 151, 837 S.E.2d 404 (2020) (holding that a minor child's strong bond with his stepmother and his father's new child supported the conclusion of a substantial change in circumstances); *Shell v. Shell*, 261 N.C. App. 30, 819 S.E.2d 566 (2018) (affirming that a mother's remarriage was a substantial change in circumstances affecting the minor children's welfare due to finding that the stepfather's "development of a strong relationship with the children and his positive involvement in the children's lives").

¶ 31 Here, since the entry of the prior order, Plaintiff went from sharing a home with a roommate that did not have space for the minor child to stay the night, to remarrying and moving into a three-bedroom home that could comfortably accommodate R.F. residing with him. Upon marrying, Plaintiff became the stepfather to a child the same age as his daughter, and Plaintiff shares a close bond with him in a "dad" role as evidenced by Plaintiff's participation in J.E.'s extracurricular activities, school activities, and homework responsibilities. The findings of fact also show that Plaintiff's new wife has warmly accepted R.F. into their family unit, and R.F. has developed strong, loving relationships with her stepmother and her stepbrother. The family regularly attends church together, and Plaintiff is interested in enrolling R.F. in extracurricular activities with her stepbrother. Based on the trial court's findings, if Plaintiff had additional custody time, he would enroll R.F. in extracurricular activities such as cheerleading, Cub Scouts, and his church's programs for children. The record also indicates that J.E. and R.F. would attend the same grade in the same school if R.F. lived with Plaintiff, which would allow Plaintiff or Kelsey to pick them both up from school together. The findings of fact show that Plaintiff has not missed visitation with R.F. and has sought additional custodial time but has only been allowed one overnight with R.F. since the entry of the prior order.

¶ 32 Plaintiff went from working two jobs at U-Haul and Dunkin' Donuts to working one job as a shop manager for an industrial engineering company, which gave him more time to spend with R.F. through flexible scheduling and paid vacation. His new employment also provides health insurance to R.F., Kelsey, and J.E., which would clearly have a positive impact on R.F.'s physical welfare considering that her "toe

walking" condition requires therapy appointments with an orthopedic specialist. Neither Intervenors nor Defendant carried health insurance on R.F. prior to Plaintiff obtaining insurance through his employment, and Intervenors choose to rely solely on the government-assisted program of Medicare rather than using the coverage Plaintiff provides to them for R.F. Plaintiff's "series of developments" in his life were sufficient to show a substantial change in circumstances that warranted modifying the consent order. *See Shipman*, 357 N.C. at 480, 586 S.E.2d at 257 (holding that a "series of developments" for a parent, including a change in employment, an imminent marriage, and a new home constituted a showing of a substantial change in circumstances that would likely be beneficial to the minor child). Additionally, it is evident that these changes would "promote the full development of [R.F.'s] physical, mental, moral, and spiritual faculties." *See Blackley*, 285 N.C. at 362, 204 S.E.2d at 680.

¶ 33 Although Plaintiff sought a joint legal custody arrangement with Defendant, the trial court made findings of fact regarding her unstable circumstances since the last order, and accordingly, precluded her from exercising primary or secondary custody. The trial court made the decision to continue Defendant's supervised visitation of R.F. based on Defendant's substantial change in circumstances, including her: (1) unemployment; (2) enrollment in a Texas in-patient rehab for drug addiction; and (3) third child being born. These findings were supported by findings of fact 45, 58, and 61, to which Defendant did not take exception; thus, these findings of fact were binding on appeal. Findings of facts 45, 58, and 61 support the trial court's conclusion of law that there had been a substantial change in circumstances considering that Defendant now visits R.F. at Intervenors' house up to six nights per week when R.F. is in Intervenors' custody. Taken in conjunction with Plaintiff's beneficial changes to the welfare of the minor child, the trial court's conclusions of law warranted the trial court to modify the custody order in favor of Plaintiff.

¶ 34 Finally, we examine whether the trial court properly concluded that a modification to the consent order was in the minor child's best interest. "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (citation and quotations omitted). We hold that there is competent evidence to support the trial court's findings; therefore, we discern no abuse of discretion in the trial court's determination that the modification order was in R.F.'s best interest.

V. Conclusion

¶ 35 We hold the trial court did not err by finding as fact in its modification order that there was an absence of findings of fact in the initial custody order regarding whether Plaintiff or Defendant are unfit or have acted inconsistently with their constitutionally-protected right as parents because such findings of fact are superfluous in our determination of whether there had been a substantial change in circumstances. Moreover, we hold the trial court did not err by modifying the custody order because the trial court's conclusion of law that there had been a substantial change in circumstances is supported by findings of fact, which are in turn based on competent evidence. The substantial change in circumstances presented by Plaintiff justifies the trial court's decision to enter the modification order.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

IN THE MATTER OF D.A.H.

No. COA20-212

Filed 20 April 2021

Confessions and Incriminating Statements—juvenile—right to Miranda warnings—school interrogation—officer silent but present—objective test for custodial interrogation

In a delinquency case involving an interrogation at a school principal's office, where the principal questioned a thirteen-year-old juvenile with a school resource officer present yet silent the entire time, the juvenile was not told that he was free to leave or refuse to answer questions, and the juvenile's guardian was not contacted until after he confessed to selling marijuana to another student, the trial court erred in denying the juvenile's motion to suppress his confession, which was a product of a custodial interrogation requiring *Miranda* warnings and the additional protections afforded juveniles under N.C.G.S. § 7B-2101. Notably, the court relied on an erroneous legal standard where it should have conducted an objective inquiry: whether a reasonable thirteen-year-old in the same circumstances would believe they were not free to leave.

IN RE D.A.H.

[277 N.C. App. 16, 2021-NCCOA-135]

Appeal by the Juvenile from an order entered on 13 August 2019 by Judge Marion M. Boone in Surry County District Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Juvenile.

JACKSON, Judge.

¶ 1 The issue in this case is whether a juvenile is entitled to *Miranda* warnings prior to being interrogated by his school principal, when the school resource officer ("SRO") is present but does not ask questions. Because we conclude that the trial court relied on an improper legal test in determining that the juvenile was not entitled to *Miranda* warnings, we reverse and remand this matter for further proceedings.

I. Factual and Procedural Background

¶ 2 This matter arises from a series of events that occurred at Gentry Middle School in Mount Airy, North Carolina during March 2019. On 11 March 2019, Deputy William Sechrist—who acted as the SRO at Gentry Middle School—was informed by school personnel that a student, Daniel, had been found with marijuana on the school bus. The school bus driver had observed Daniel[1] holding a small netted bag containing a leafy substance. The bus driver handed over the bag to Deputy Sechrist, who recognized the substance as marijuana. Deputy Sechrist then escorted Daniel to the principal's office and called Daniel's father.

¶ 3 Once inside the principal's office, Daniel "asked to speak freely," but Deputy Sechrist told him to "wait until your daddy gets here." Once Daniel's father arrived, Daniel told Deputy Sechrist the details of how he obtained the marijuana. Daniel explained that the previous weekend, he had contacted a fellow student—13-year-old Deacon—via Snapchat asking to buy some marijuana. Daniel and Deacon then met up in the school locker room on the morning of March 11, and Deacon gave Daniel a small bag of marijuana in exchange for $25. Deputy Sechrist performed a field test on the substance, which confirmed that the substance was 0.7 grams of marijuana.

1. Pseudonyms are used to protect the privacy of the juveniles.

¶ 4 Deacon was absent from school the following two days (March 12 and 13) and the record contains no indication that the school or the deputy took any efforts to contact Deacon or his guardian during this time. On 14 March 2019, Deacon reappeared in class and was summoned to the principal's office. When Deacon arrived at the principal's office, both Principal Whitaker and Deputy Sechrist were present. Deputy Sechrist was in uniform, and Principal Whitaker was wearing a suit and tie. Principal Whitaker and Deputy Sechrist sat together on one side of the table, facing Deacon. At the time that Deacon arrived, his guardian had not been told that Deacon was in the principal's office.

¶ 5 Principal Whitaker began questioning Deacon. The only evidence of what occurred during this meeting comes from the testimony of Deputy Sechrist, who offered three slightly differing accounts of how the meeting proceeded. When first asked about the meeting (on direct examination), Deputy Sechrist did not specify what precisely was asked of Deacon, but stated that Deacon "advised Mr. Whitaker he did not come to school for two days [because] he was scared he was going to get in trouble because he . . . sold marijuana to [Daniel]."

¶ 6 When asked about the meeting for a second time on cross-examination, Deputy Sechrist stated that Principal Whitaker had "asked [Deacon] to tell . . . what had taken place," and in response Deacon told them "that he had sold [Daniel] some marijuana, where he got it, and all this other stuff."

¶ 7 When asked about the meeting for a third time on redirect-examination, Deputy Sechrist described the conversation in more detail, explaining that the following exchange occurred between Deacon and Principal Whitaker:

> **[Principal]:** Where have you been for the last few days?
>
> **[Deacon]:** Well, I've been afraid to come to school I'd get in trouble [sic].
>
> **[Principal]**: In trouble for what?
>
> **[Deacon]**: What I sold [Daniel].
>
> **[Principal]**: What did you sell him?
>
> **[Deacon]**: Marijuana.

¶ 8 Deputy Sechrist stated that after this confession, Principal Whitaker called Deacon's grandmother, who arrived "probably . . . 10 minutes"

after Deacon was brought into the office. He also stated that "[n]ot very many questions were even asked prior to her arrival."

¶ 9 After Deacon's grandmother arrived, the principal asked Deacon to tell his grandmother "what had taken place[,]" and Deacon repeated his statements to his grandmother. Deputy Sechrist testified that at no point was Deacon read his *Miranda* rights, told he did not have to answer their questions, nor told that he was free to leave.

¶ 10 Several months later, a juvenile petition was filed on 13 May 2019 alleging that Deacon had sold a schedule six controlled substance (marijuana) to another student in violation of N.C. Gen. Stat. § 90-95(a)(1). Deacon filed a motion to suppress on 13 August 2019, arguing that his statements to Principal Whitaker were inadmissible as his confession was obtained in violation of his *Miranda* rights. A hearing was held on the matter that same day (13 August 2019), during which the trial court concluded that Deacon was not entitled to *Miranda* warnings because the meeting with the principal was not a custodial interrogation. In denying Deacon's motion to suppress, the trial court found and concluded in open court as follows:

> I am going to deny the Motion to Suppress. A number of things stand out to me. The officer . . . he is the SRO. He's there every day. This wasn't some strange police officer that was called to stand guard at the door. I think it's not unusual in a school setting for many or any of the children to be called to the office or principal's office. I don't think that automatically tends to turn it into a custodial interrogation. The young man was not in custody. He wasn't even questioned by the School Resource Officer, who was a daily presence there at the school. It wasn't some strange officer in a uniform.
>
> Also, another reference was made, of which I think that anybody at school would have had reason to ask, if apparently [Deacon] was out of school. Because the officer said that [Deacon] . . . told the principal he didn't come to school for two days because he was scared he would get in trouble for selling marijuana. I don't know that any officer would ever even ask: Why didn't you come to school? But a principal certainly would or should ask if a child's been absent from school.

> Therefore, I don't see that it was outside the scope of anything. I think that was certainly, regardless of who was in the room or not, a proper question. And that's what it sounds like it was in response to: Why weren't you in school the past two days? Well, I didn't come to school the past two days because I was afraid I'd get in trouble for selling marijuana to [Daniel].
>
> So I don't see this as a custodial interrogation. And the motion is denied.

¶ 11 Deacon was ultimately adjudicated delinquent for the sale and delivery of marijuana. In adjudicating Deacon delinquent, the trial court relied on Deacon's confession that he had sold marijuana to Daniel, as well as Daniel and Deputy Sechrist's hearing testimony that the substance sold was marijuana.

¶ 12 A disposition order was not entered within 60 days after entry of the adjudication order, so, pursuant to N.C. Gen. Stat. § 7B-2602, Deacon entered notice of appeal within 70 days from entry of the adjudication order. The trial court ordered on 25 October 2019 that disposition was stayed pending resolution of Deacon's appeal.

II. Analysis

¶ 13 On appeal, Deacon argues that the trial court erred in denying his motion to suppress because his statements were the product of a custodial interrogation and made without *Miranda* warnings or the additional protections of N.C. Gen. Stat. § 7B-2101. Deacon further argues that the trial court's error was prejudicial and not harmless beyond a reasonable doubt. As explained below, we hold that the trial court's order fails to apply the appropriate legal principles, and we must remand this matter to the trial court for additional proceedings.

A. Standard of Review

¶ 14 Our review of a trial court's order on a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Legal conclusions, including the question of whether a person has been interrogated while in police custody, are reviewed de novo." *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010). Under de novo review, this Court "considers

the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted).

B. Motion to Suppress—Legal Background

1. Juvenile Miranda *Rights*

¶ 15 This case presents a unique issue regarding the nature and extent of a juvenile's right to receive *Miranda* warnings in the context of a school interrogation. *Miranda* rights stem from the Fifth Amendment of the United States Constitution, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The basic holding of *Miranda v. Arizona* instructs that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized" and thus "[p]rocedural safeguards must be employed." *Miranda v. Arizona*, 384 U.S. 436, 478, (1966).

¶ 16 It is well-established that juveniles, just like adults, are entitled to receive *Miranda* warnings prior to in-custody interrogations in order to protect their right against self-incrimination. *In re Gault*, 387 U.S. 1, 55 (1967). *See also K.D.L.*, 207 N.C. App. at 457, 700 S.E.2d at 770 ("In order to protect the Fifth Amendment right against compelled self-incrimination, suspects, including juveniles, are entitled to the warnings set forth in *Miranda v. Arizona* prior to police questioning.").

¶ 17 In addition to the rights mandated by *Miranda*, in North Carolina our General Assembly "has established statutory protections for juveniles" who face custodial interrogation. *In re L.I.*, 205 N.C. App. 155, 158, 695 S.E.2d 793, 797 (2010). Specifically, under N.C. Gen. Stat. § 7B-2101,

> [a]ny juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed

> for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a)(1)–(4) (2019).

¶ 18 The Juvenile Code provides for even greater protections if the juvenile who is interrogated is younger than 16:

> When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

Id. § 7B-2101(b). In this respect, "our General Statutes codify and *enhance* the protections required under *Miranda*." *In re J.D.B.*, 363 N.C. 664, 668, 686 S.E.2d 135, 138 (2009) (emphasis added), *rev'd and remanded sub nom. J.D.B. v. North Carolina*, 564 U.S. 261 (2011). However, the protections of *Miranda* and § 7B-2101 are only triggered when the juvenile is subjected to a custodial interrogation. *In re A.N.C.*, 225 N.C. App. 315, 319, 750 S.E.2d 835, 838 (2013). In other words, "the general *Miranda* custodial interrogation framework is applicable to section 7B-2101." *In re K.D.L.*, 207 N.C. App. at 458, 700 S.E.2d at 770.

¶ 19 In general, a custodial interrogation occurs when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* (internal marks and citation omitted). This inquiry has traditionally been broken down into a two-part test: (1) whether the suspect was in custody; and (2) whether the statement was made in the context of an interrogation. *See id.*

¶ 20 As for the custody element, the basic test is "whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). This element is viewed objectively from the standpoint of a reasonable observer. *Stansbury v. California*, 511 U.S. 318, 323 (1994). As for the interrogation element, an interrogation occurs when the authorities use "any words or actions" that they "should know are reason-

ably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). This element "is also determined objectively" with reference to the "totality of the circumstances." *In re K.D.L.*, 207 N.C. App. at 458, 700 S.E.2d at 770.

2. Juvenile Miranda *Rights in the Context of the Schoolhouse*

¶ 21 The questioning of juveniles in the context of the schoolhouse presents unique *Miranda* considerations. First, it should be noted that *Miranda* "does not automatically apply to *all* government actors"—rather, it only applies to interrogations conducted by (or in concert with) law enforcement officers. *Id.* at 459, 700 S.E.2d at 771. For example, a student simply being questioned by a principal would not generally qualify as a custodial interrogation, but a student questioned by an SRO certainly could. *See id.* Second, the schoolhouse is a unique forum because "schoolchildren inherently shed some of their freedom of action when they enter the schoolhouse door," given educators' need "to control the school environment." *Id.* (internal marks and citation omitted). Due to the constraints inherent in the schoolhouse environment, we have held that a child is only under custodial interrogation when "he is subjected to additional restraints beyond those generally imposed during school." *Id.*

¶ 22 The first case to fully articulate this heightened schoolhouse standard was *In re K.D.L.*, 207 N.C. App. at 454, 700 S.E.2d at 768. There, after a 12-year-old student was discovered with marijuana in the classroom, he was taken to the assistant principal's office. *Id.* The SRO arrived at the assistant principal's office, briefly spoke with the juvenile, frisked him to search for weapons, and then transported the juvenile in his patrol car to the principal's office (which was located in a separate building). *Id.* Once in the principal's office, the SRO remained present while the principal questioned the juvenile. *Id.* The juvenile first denied that the marijuana was his, but eventually confessed. *Id.* All in all, the juvenile was questioned "for about five or six hours" by the principal and "was not permitted to leave for lunch." *Id.* at 455, 700 S.E.2d at 768. The questioning began around 9:00 a.m., but the juvenile's mother was not contacted until around 3:00 p.m. *Id.* The juvenile later filed a motion to suppress, which was denied by the trial court. *Id.* at 455, 700 S.E.2d at 768-69.

¶ 23 On appeal, we held that the juvenile's confession "should have been suppressed" as it was obtained in violation of his *Miranda* rights. *Id.* at 456, 700 S.E.2d at 769. We noted that "despite the decreased level of freedoms in schools," we still must not "forget that police interrogation is inherently coercive—particularly for young people." *Id.* at 459,

700 S.E.2d at 771. We emphasized that the State "has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *Id.* at 460, 700 S.E.2d at 771 (internal marks and citation omitted).

¶ 24 We concluded that the juvenile's statements were made during a custodial interrogation because "a reasonable person in his situation would believe he was functionally under arrest." *Id.* at 461, 700 S.E.2d at 772. As for the custody element of the *Miranda* test, we relied on the following factors to conclude that the juvenile was in custody: (1) the juvenile "knew he was suspected of a crime" and was "accused of drug possession"; (2) he "was interrogated for about six hours"; (3) the interrogation occurred "generally in the presence of an armed police officer"; (4) the juvenile "was frisked by that officer and transported in the officer's vehicle" to the principal's office; and (5) "at no point was there any indication that [the juvenile] was free to leave." *Id.* We reasoned that these occurrences went beyond "the usual restraints generally imposed during school" and instead were closer to those that would "likely [be] experienced by an arrestee." *Id.*

¶ 25 As for the interrogation element of the *Miranda* test, we first noted that this was a "unique situation because [the SRO] did not ask any questions." *Id.* Nevertheless, we concluded that an interrogation had occurred because

> [the SRO's] conduct significantly increased the likelihood [the juvenile] would produce an incriminating response to the principal's questioning. His near-constant supervision of [the juvenile's] interrogation and "active listening" could cause a reasonable person to believe [the principal] was interrogating him in concert with [the SRO] or that the person would endure harsher *criminal* punishment for failing to answer.

Id. Thus, because the juvenile had "made his confession in the course of custodial interrogation without being afforded the warnings required by *Miranda* and section 7B-2101(a), and because he was not apprised of and afforded his right to have a parent present," we held that the trial court erred in denying the motion to suppress. *Id.* at 462, 700 S.E.2d at 773.

¶ 26 Another prominent recent case addressing the issue of schoolhouse interrogations was *In re J.D.B.*, 363 N.C. at 668, 686 S.E.2d at 138 (2009). There, a 13-year-old student was called into the principal's office after he

was found in possession of a stolen camera. *Id.* at 665-66, 686 S.E.2d at 136. Present in the room were the assistant principal, the SRO, and an investigator employed by the local police force. *Id.* Prior to the meeting, the juvenile was not given a *Miranda* warning, and was not offered the opportunity to speak with a parent. *Id.* During the approximately 30 to 45 minute interview, the assistant principal repeatedly urged the juvenile to "do the right thing" and "tell the truth," and the investigator informed him that he knew about the stolen cameras. *Id.* at 666-67, 686 S.E.2d at 136-37. The juvenile ultimately confessed to having stolen the cameras, and these incriminating statements later resulted in an unsuccessful motion to suppress by the juvenile. *Id.* at 666-68, 686 S.E.2d at 137.

¶ 27 When the case reached the North Carolina Supreme Court, the Court held that no *Miranda* warning was necessary because no custodial interrogation had occurred. *Id.* at 670, 686 S.E.2d at 139. The Court based its holding on the fact that the SRO participated only minimally in the questioning; the juvenile was not restrained or locked in the room; and the juvenile appeared to have participated willingly. *Id.* The Court specifically declined to consider the juvenile's "age and his status as a special education student" in reaching its holding, explaining that these factors were not an appropriate part of the objective test under *Miranda*. *Id.* at 671-72, 686 S.E.2d at 139-40.

¶ 28 The United States Supreme Court disagreed, however, granting certiorari to review whether "a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave." *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72 (2011) (internal marks and citation omitted). The Court ultimately reversed and remanded the case, after determining that a child's age *should* be a relevant consideration in a custody analysis. *Id.* at 281.

¶ 29 The Court began by noting the "inherently compelling pressures" of custodial interrogation—a risk which is "all the more acute" when the subject is a juvenile. *Id.* at 269 (internal marks and citation omitted). Observing that "children generally are less mature and responsible than adults," the Court went on to note that minors also "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 272 (internal marks and citation omitted). Specific to law enforcement interrogations, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go," the Court observed. *Id.* And in many cases, "the custody analysis would be nonsensical absent some consideration of the suspect's age." *Id.* at 275.

¶ 30 The Court considered the school setting to present just such a situation. *Id.* In the school setting, "[n]either officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances[,]" the Court reasoned. *Id.* at 276. The Court went on to note that

> the effect of the schoolhouse setting cannot be disentangled from the identity of the person being questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event[.] . . . Without asking whether the person questioned in the school is a minor, the coercive effect of the schoolhouse setting is unknowable.

Id. at 276 (internal marks and citation omitted).

¶ 31 Accordingly, the Court found that considering a child's age was perfectly consistent with the objective nature of the *Miranda* test. *Id.* The Court cautioned that while "a child's age will [not] be a determinative, or even a significant, factor in every case," in many cases it is "a reality that courts cannot simply ignore." *Id.* at 277. Thus, the Court ultimately held that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id.* at 277.

¶ 32 Another prominent decision in our juvenile *Miranda* caselaw was *In re D.A.C.*, 225 N.C. App. 547, 741 S.E.2d 378 (2013). There, officers were investigating gunshots that had been fired into a home when they encountered a juvenile in the yard across the street. *Id.* at 548, 741 S.E.2d at 379. The juvenile's father came outside and encouraged the juvenile "to go with the officers and to be truthful." *Id.* The officers asked the juvenile if he would speak with them and they received an affirmative response. *Id.* They walked with the juvenile to the corner of the yard, about "ten feet outside the home, where they talked for about five minutes." *Id.* They all stood at arms' length from each other, and though both officers were armed, "neither of them touched or made any movement towards their weapons at any point." *Id.* at 548-49, 741 S.E.2d at 380. However, the officers never expressly told the juvenile that he was free to leave or that he did not have to answer their questions. *Id.*

¶ 33 After the officers asked the juvenile whether he had fired the shots, the juvenile confessed. *Id.* at 549, 741 S.E.2d at 380. The juvenile later filed a motion to suppress his confession for violation of his *Miranda* rights, which was denied by the trial court. *Id.* On appeal, we held that the trial court acted properly because the juvenile was not subjected to a custodial interrogation while speaking with the officers. *Id.* at 550, 741 S.E.2d at 380. "A careful analysis of the totality of the circumstances surrounding the making of [the] Juvenile's statement clearly indicate[d] . . . that [he] was not subject to the degree of restraint inherent in a formal arrest[,]" we reasoned. *Id.* at 552, 741 S.E.2d at 382. We relied on the fact that (1) the officers "asked him to step outside, rather than instructing him to do so"; (2) the juvenile did nothing more than "answer a simple, straightforward question" posed to him by the officers; (3) during the conversation, all three participants "were standing and remained at arm's length from each other"; (4) the conversation occurred "in broad daylight," "in an open area in [the juvenile's] own yard with his parents nearby"; and (5) the conversation only lasted for about five minutes. *Id.* at 553, 741 S.E.2d at 382.

¶ 34 Finally, *In re R.P.*, 216 N.C. App. 585, 718 S.E.2d 423, 2011 WL 5185568 (2011) (unpublished), demonstrates how this Court has addressed cases that fail to properly apply the standard from *J.D.B.* There, a high-school student filed a motion to suppress an incriminating statement he made to an SRO, but his motion was denied by the trial court. *Id.* at *1-2. On appeal, we discussed the decisions in both *In re K.D.L.* and *J.D.B.*, noting that under then-current North Carolina *Miranda* law, we were required to consider both (1) whether the student had been subjected to restraints that go beyond "the limitations that are characteristic of the school environment in general," and (2) how "the juvenile's age and experience" might factor into the custodial question. *Id.* at *3 (internal marks and citation omitted). However, because the trial court failed to issue a written order, and because the trial transcript left us "unable to discern whether the trial court considered the juvenile's age in accordance with the United States Supreme Court's mandate in *In re J.D.B.*," we concluded that it necessary to remand the matter for further fact-finding. *Id.* at *4.

3. Clarifying the Juvenile Custodial Interrogation Test

¶ 35 Today we harmonize our prior opinions on this issue in light of the United States Supreme Court's holding in *J.D.B.* and the holdings of our sister courts in other states. There can be no doubt that educators and law enforcement are increasing their collaboration in the school setting and that school officials are increasingly becoming active par-

ticipants in the criminal justice system. While potentially warranted for both the educational and safety needs of our children, this cooperation must be consistent with the Fifth Amendment's guarantee against self-incrimination. As the United States Supreme Court recognized in *J.D.B.*, the Fifth Amendment requires that minors under criminal investigation be protected against making coerced, inculpatory statements, even when—and perhaps, in some cases, particularly because—they are on school property. *J.D.B.*, 564 U.S. at 275. Increased cooperation between educators and law enforcement cannot allow the creation of situations where no *Miranda* warnings are required just because a student is on school property.

¶ 36 To that end, we believe that one aspect of the schoolhouse *Miranda* test is particularly deserving of an in-depth review here—namely, the extent of the SRO's involvement in the interrogation. On one end of the custodial spectrum, it is near-universally agreed that a meeting solely between a student and school officials generally will not qualify as a custodial interrogation. *See In re K.D.L.*, 207 N.C. App. at 459, 700 S.E.2d at 771 (noting that *Miranda* "does not automatically apply to all government actors"—rather, it only applies to interrogations conducted by, or in concert with, law enforcement officers); *D.Z. v. State*, 100 N.E.3d 246, 247 (Ind. 2018) ("[W]hen school officials alone meet with students, a clear rule governs: *Miranda* warnings are not required."); Martin R. Gardner, *Removing Miranda from School Interrogations*, 99 Neb. L. Rev. 16, 30 (2020) ("If there is no law enforcement involvement, then there is no custody and no *Miranda* applicability.").

¶ 37 On the other end of the spectrum, an interview that features heavy SRO involvement or direction will often qualify as a custodial interrogation. *See*, *e.g.*, *In re R.H.*, 568 Pa. 1, 4-8, 791 A.2d 331, 332-35 (2002) (holding that *Miranda* warnings should have been given where a student was removed from class by an SRO and interrogated by the officer for 25 minutes, and where the interrogation "ultimately led to charges by the municipal police, not punishment by school officials pursuant to school rules").

¶ 38 Then there are cases between those two ends of the spectrum—cases like the present one—where the SRO is present while the juvenile is questioned by school officials but does not participate in the questioning, or where the SRO participates minimally in the questioning. We hold that circumstances such as these can indeed qualify as custodial interrogations where *Miranda* warnings are required. As discussed above, in *In re K.D.L.*, we held that *Miranda* warnings were required even when the SRO remained silent throughout the juvenile's interview. *See In re*

K.D.L., 207 N.C. App. at 461, 700 S.E.2d at 772 (holding that a custodial interrogation had occurred—despite the fact that the SRO "did not ask any questions"—because the SRO's "near-constant supervision" of the interrogation and "active listening" throughout might "cause a reasonable person to believe" that the principal was interrogating the juvenile "in concert with" the SRO).

¶ 39 Today we reaffirm this principle. We agree that when a student is interrogated in the presence of an SRO—even when the SRO remains silent—the presence of the officer can create a coercive environment that goes above and beyond the restrictions normally imposed during school, such that a reasonable student would readily believe they are not free to go. This holding recognizes the "reality that courts cannot simply ignore"—that juveniles are uniquely susceptible to police pressure and may feel compelled to confess when a reasonable adult would not. *J.D.B.*, 564 U.S. at 277.

¶ 40 Moreover, this holding is consistent with the decisions of other state appellate courts. Since the time *In re K.D.L.* was decided in 2010, several other state appellate courts have approved of this rationale—recognizing that oftentimes the presence of an SRO during schoolhouse questioning can transform what otherwise might appear to be a voluntary encounter into a custodial interrogation. *See*, *e.g.*, *N.C. v. Commonwealth*, 396 S.W.3d 852, 854-62 (Ky. 2013) (holding that *Miranda* warnings were required when the SRO was "present throughout" the juvenile's interrogation by the principal—despite the SRO's minimal involvement in the questioning—because "[n]o reasonable student . . . would have believed that he was at liberty to remain silent, or to leave" under the circumstances); *State v. Antonio T.*, 352 P.3d 1172, 1179-80 (N.M. 2015) (holding that the SRO's "mere presence during [the principal's] questioning of [the juvenile] converted the school disciplinary interrogation into a criminal investigatory detention," because the SRO's presence "created a coercive and adversarial environment that does not normally exist during interactions between school officials and students"); *B.A. v. State*, 100 N.E.3d 225, 229-34 (Ind. 2018) (holding that although the officers "did not directly question" the juvenile during his interrogation by the principal, nevertheless the "consistent police presence" throughout the interview "would place considerable coercive pressure on a reasonable student in [the juvenile's] situation" and required the provision of *Miranda* warnings).

¶ 41 Thus, we reiterate that the presence of an SRO (or other law enforcement officer) while a student is interrogated by a school official weighs heavily on the scale when determining whether what otherwise

might appear to be a voluntary encounter is instead a custodial interrogation. However, we also note that the involvement of an SRO in the questioning is a factor which is relevant, *but is not by itself dispositive*, to the question of whether the encounter between a child and a school official is a custodial interrogation. We still must look to all of the remaining *Miranda* factors to determine if any statements the student makes were the product of a custodial interrogation.

a. Custody

¶ 42 The first element of the *Miranda* test asks whether the juvenile was in custody. As explained by the United States Supreme Court,

> [W]hether a suspect is in custody is an objective inquiry. Two discrete inquiries are essential to the [custody] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.
>
> . . .
>
> Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to examine all of the circumstances surrounding the interrogation, including any circumstances that would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave.

J.D.B., 564 U.S. at 270-71 (internal marks and citation omitted).

¶ 43 After thoroughly reviewing the caselaw from this state, the United States Supreme Court, and persuasive authority from other jurisdictions, we conclude that the following factors are most relevant in determining whether a juvenile is in custody in the context of a schoolhouse interview:

(1) traditional indicia of arrest;

(2) the location of the interview;

(3) the length of the interview;

(4) the student's age;

(5) what the student is told about the interview;

(6) the people present during the interview; and,

(7) the purposes of the questioning.

¶ 44 First—was the student subjected to any of the traditional indicia of arrest? If the student was handcuffed, transported in a police car, subjected to a search of his or her person or belongings, or otherwise bodily restrained, then this is a strong indication that the student was in custody. *See*, *e.g.*, *In re K.D.L.*, 207 N.C. App. at 461, 700 S.E.2d at 772 (juvenile was in custody when he was "frisked by [the] officer and transported in the officer's vehicle to [the principal's] office," as this is a type of restraint that is "more likely experienced by an arrestee" than a student); *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) ("Circumstances supporting an objective showing that one is 'in custody' might include a police officer standing guard at the door, locked doors, or application of handcuffs."); *B.A.*, 100 N.E.3d at 232 ("On the other end of the [custody] spectrum lie armed and uniformed police officers who pull students from class in handcuffs before questioning them.").

¶ 45 Second—where was the interview held? If the interview was conducted in a location that a reasonable child might consider confining, this tends to show that the child was in custody. *See*, *e.g.*, *State v. Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (1997) ("We think it unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these locations for disciplinary reasons[.]"). On the other hand, if the interview was held in a location where a child is likely to feel comfortable and at-ease, this tends to show that the child was not in custody. *See*, *e.g.*, *In re D.A.C.*, 225 N.C. App. at 553, 741 S.E.2d at 382 (holding that no custody occurred because "instead of being involved in a closed door conference room with police and an assistant principal, [the] juvenile was questioned in an open area in his own yard with his parents nearby") (internal marks and citation omitted). Other relevant considerations include the size of the room, whether the door was closed or locked, and the child's familiarity with that specific location.

¶ 46 Third—how long was the interview? A long, drawn-out questioning tends to show that the child was in custody, whereas a very brief questioning does not. *Compare In re K.D.L.*, 207 N.C. App. at 461, 700 S.E.2d at 772 (juvenile was in custody where he "was interrogated for about six hours, generally in the presence of an armed police officer") *with In re D.A.C.*, 225 N.C. App. at 553, 741 S.E.2d at 382 (juvenile was not in custody when "the conversation between Juvenile and the investigating officers . . . lasted for about five minutes"). Other relevant considerations

include whether the child was offered a place to sit, and whether the child is offered common courtesies such as food, water, or bathroom breaks. *See State v. Hammonds*, 370 N.C. 158, 164, 804 S.E.2d 438, 443 (2017) (suspect was not in custody when "the detectives offered [him] food or drink" and bathroom breaks were made available).

¶ 47 Fourth—how old was the student? As explained by the United States Supreme Court in *J.D.B.*, younger children are far more "vulnerable or susceptible to outside pressures" than older children or adults. *See J.D.B.*, 564 U.S. at 272 (internal marks and citation omitted). Thus, the younger the student, the more sensitive the student will be to circumstances that could be coercive—"[s]o long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer." *Id.* at 274. *Compare Doe*, 130 Idaho at 819, 948 P.2d at 174 (holding that it was "unlikely that any ten-year-old would feel free to simply leave" when questioned by an SRO or school authorities); *with J.D.B.*, 564 U.S. at 277 (explaining that "teenagers nearing the age of majority" are unlikely to feel the same coercive pressures as younger children) (internal marks and citation omitted).

¶ 48 Fifth—what was the student told about the interview? If the student is informed that he or she is free to leave, that answering questions is not required, or is offered the opportunity to call a parent or guardian, then this tends to show that the student was not in custody. *See*, *e.g.*, *In re Hodge*, 153 N.C. App. 102, 108, 568 S.E.2d 878, 882 (2002) (juvenile was not in custody when the detective "prefaced her interview with [the juvenile] by saying, 'you don't have to talk to me,' 'I am not going to arrest you' "). On the other hand, if the student is not informed about the nature of the interview, and is not told whether his or her presence is compulsory or voluntary, this weighs in favor of the conclusion that the student was in custody. *See In re K.D.L.*, 207 N.C. App. at 461-62, 700 S.E.2d at 772-73 (juvenile was in custody where he "knew he was suspected of a crime," and there was "no suggestion anything transpired that would cause him to believe he was free to leave"). And of course, a student is certainly in custody if he or she is expressly told not to leave.

¶ 49 Sixth—who all is present during the interview? If the student is questioned in the presence of multiple SROs or other law enforcement officers, or even by numerous school officials, this tends to show that the student was in custody. *See*, *e.g.*, *B.A.*, 100 N.E.3d at 232 (considering the "number of officers present and how they are involved" as a key step in custody analysis). On the other hand, if a parent, guardian, or other person who can advocate for the child (such as a guidance counselor), is present or nearby during the interview, this suggests a reasonable child

would not have felt coerced. *Compare In re D.A.C.*, 225 N.C. App. at 553, 741 S.E.2d at 382 (juvenile was not in custody when he was "questioned in an open area in his own yard with his parents nearby"); *with Doe*, 130 Idaho at 818, 948 P.2d at 173 (juvenile was in custody when "[n]o parent or other adult concerned with Doe's best interest was present during the questioning").

¶ 50 Seventh—what were the objectively apparent purposes of the interview? In other words, was the interview primarily a criminal investigation or primarily a school disciplinary matter? *See Antonio T.*, 352 P.3d at 1179 ("Questioning a child for school disciplinary matters is distinguishable from questioning a child for suspected criminal wrongdoing."); *N.C.*, 396 S.W.3d at 865 (explaining that even "when law enforcement is involved" in the questioning of a student, *Miranda* warnings are not necessary "if the matter purely concerns school discipline"). If the interview was the result of specific criminal suspicion directed toward the student, questioning occurring during the investigation of this suspicion will be subject to closer scrutiny by courts. *See In re D.A.C.*, 225 N.C. App. at 552, 741 S.E.2d at 382 (holding that "the degree to which suspicion had been focused on the defendant" prior to the interview is a relevant *Miranda* factor) (internal marks and citation omitted); *In re K.D.L.*, 207 N.C. App. at 461, 700 S.E.2d at 772 (interview was custodial when juvenile "knew he was suspected of a crime" as opposed to a mere violation of school rules). On the other hand, if the interview is a disciplinary investigation into the breaking of school rules and its result is unlikely to involve the criminal justice system, questioning of the student will not be considered to have occurred while the student was in custody. *See*, *e.g.*, *Matter of Phillips*, 128 N.C. App. 732, 735, 497 S.E.2d 292, 294 (1998) (no *Miranda* warnings required when school officials "did not question the juvenile to obtain information to use in criminal proceedings but questioned her simply for school disciplinary purposes").

¶ 51 The purpose of an interview (criminal vs. disciplinary) can also be revealed by examining the degree and nature of the cooperation between school officials and law enforcement, including an SRO. Did the SRO work with the school official by following a set of pre-defined procedures in conducting the interview? For example, if school officials typically follow a certain process when disciplining a child for breaking school rules, and use a different process when investigating criminal activity, then the use of (or departure from) these procedures is instructive. *See*, *e.g.*, *N.C.*, 396 S.W.3d at 854 (evidence showed that student was in custody when principal and SRO had employed a "loose

routine they followed for questioning students when there was suspected criminal activity").

b. Interrogation

¶ 52 The second element of the *Miranda* test asks whether the juvenile was subject to an interrogation. Under this element, the primary concern is whether the authorities employed "any words or actions" that they "should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301. The focus here is on "the suspect's perceptions" of the encounter, "rather than on the intent of the law enforcement officer." *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000).

¶ 53 In the context of a schoolhouse interrogation, the following factors are most relevant to the interrogation element:

(1) the nature of the questions asked (interrogative or mandatory);

(2) the willingness of the juvenile's responses; and,

(3) the extent of the SRO's involvement.

¶ 54 First—what was the nature of the statements made by the questioner? If the questions were mostly open-ended (e.g., "would you like to tell me what happened?"), this weighs against concluding that the questioning was an interrogation. *See*, *e.g.*, *In re D.A.C.*, 225 N.C. App. at 553, 741 S.E.2d at 382 (juvenile was not subject to custodial interrogation when he was "asked . . . rather than instruct[ed]" to cooperate, and "did nothing more . . . than answer a simple, straightforward question"). On the other hand, if the questions are accompanied by imperative statements suggesting compliance is mandatory (e.g., "you have to tell me the truth"), this supports the conclusion that the questioning was an interrogation. *See*, *e.g.*, *In re K.D.L.*, 207 N.C. App. at 462, 700 S.E.2d at 773 (juvenile was subject to custodial interrogation when he was not "given *the option* of answering questions," but rather was instructed to answer). The tone of voice, volume, and body language used by the questioner are also relevant here. *See Hammonds*, 370 N.C. at 164, 804 S.E.2d at 443 (no custodial interrogation when the conversation with the suspect was "calm and cordial in tone" and "the detectives offered [the suspect] food or drink").

¶ 55 Second—how willingly did the subject respond to the questions? If the juvenile makes a wholly unsolicited or spontaneous statement, such a statement is unlikely to be considered to have been made in the

context of interrogation. *See In re D.L.D.*, 203 N.C. App. 434, 444, 694 S.E.2d 395, 403 (2010) (no custodial interrogation occurred when juvenile's "unsolicited and spontaneous" statement was "not [made] at the questioning of the officers") (internal marks and citation omitted). On the other hand, if a juvenile expresses hesitancy or reluctance to answer, claims ignorance of a subject, or must be coaxed into answering, this weighs in support of the ultimate conclusion that any statements made occurred during an interrogation.

¶ 56 Third—what was the extent of the involvement of law enforcement? As discussed above, a custodial interrogation can occur even when the SRO is present while a student is interviewed by school officials but does not ask questions. However, the scope and extent of the SRO's involvement in the questioning is still a relevant factor in ascertaining whether or not an interrogation occurred. If the SRO was not present for the entirety of the questioning or for significant portions of it, the absence of the officer can weigh against the conclusion that the questioning qualified as an interrogation. *See In re R.B.L.*, 242 N.C. App. 383, 776 S.E.2d 363, 2015 WL 4429626, at *1-8 (2015) (unpublished) (juvenile was not subject to custodial interrogation when the SRO "stood off to [the] side," did not ask questions, and "entered and exited the room several times" during the interview). On the other hand, if the SRO directs the questioning, either by leading it or participating heavily in it, this weighs in support of the conclusion that the questioning was an interrogation. *In re K.D.L.*, 207 N.C. App. at 461, 700 S.E.2d at 772.

¶ 57 Finally, we note that as with the reasonable adult standard, no single factor is controlling in determining whether statements made by a juvenile are the product of custodial interrogation. Rather, the inquiry is whether the totality of the circumstances surrounding the questioning "add up to custody." *J.D.B.*, 564 U.S. at 278 (citation omitted).

C. Application

¶ 58 Now we turn to the facts of the present case and the issue of whether the statements Deacon made were the product of a custodial interrogation. To briefly review, 13-year-old Deacon was called into to the principal's office after officers received a tip that Deacon had sold marijuana to another student. He was then questioned by the principal while the SRO was present the entire time, and after some prompting made a confession. It was not until after Deacon made this confession that his guardian was contacted, and at no point was he told that he was free to leave or to refuse to answer questions. We hold that this amounted to a custodial interrogation and that the trial court erred in concluding otherwise and denying the motion to suppress.

1. Custody

¶ 59 First—would a reasonable student in Deacon's place have felt free to terminate the interview and leave, under these circumstances? We conclude that a reasonable 13-year-old would not, given the location of the interview, what Deacon could have known about the interview before it began, the people present during the interview, and the investigatory purpose of the interview.

¶ 60 Thirteen-year-old Deacon arrived at school on the morning of 14 March 2019 knowing that he was in trouble—knowing that his classmate had recently been caught with the marijuana that Deacon had sold him. In fact, he had been absent from school the prior two days because he was so nervous about what might happen when he returned. His worries were confirmed when he was summoned to the principal's office that morning, where both Principal Whitaker and Deputy Sechrist were waiting for him. The two authority figures sat together opposite Deacon. Deputy Sechrist was wearing his uniform, and Principal Whitaker was dressed formally in a suit. Deacon was not told that he was free to go, was not told that he did not have to answer questions, and was not told that he could call his grandmother if he wished.

¶ 61 We hold that, under these circumstances, no reasonable 13-year-old would have felt free to leave. Even before any questions were asked, it appeared that this interview was for purposes of a criminal investigation rather than a mere disciplinary matter. Deacon's classmate Daniel had been caught with marijuana only three days prior, and had admitted that he bought the drugs from Deacon. Deputy Sechrist and Principal Whitaker were thus following a lead as a part of a criminal investigation when they called Deacon into the office to be questioned.

¶ 62 The State contends that this was purely a disciplinary matter (and that no *Miranda* warning was required) because Principal Whitaker was only concerned with why Deacon had missed school the previous two days. While it is true that Deacon had missed school for two days, if this had been a pure disciplinary matter regarding Deacon's absences, then there would have been no reason to have the SRO present. Though the record does not demonstrate what typical procedures Gentry Middle School follows when a student has accrued two days' worth of absences—absences which might not have been unexcused[2]—we strongly suspect that not every instance involves a student being summoned out of class to meet with the principal and a uniformed SRO.

2. Deputy Sechrist admitted at the suppression hearing that he did not know whether Deacon's absences were unexcused.

¶ 63 Moreover, once inside the principal's office—an intimidating atmosphere to any reasonable 13-year-old—Deacon found himself in a room not only with the principal, but also the same officer that had questioned Daniel. A reasonable student in Deacon's position would believe that he was going to be questioned about potential criminal behavior, not disciplined for missing two days of school. Accordingly, we hold that Deacon was in custody at the time of his questioning by Principal Whitaker and Deputy Sechrist.

2. Interrogation

¶ 64 We must next address whether Deacon was subjected to interrogation—i.e., whether the questioning was of a nature that the two authority figures should have known was likely to elicit an incriminating response from Deacon. We conclude that the answer to this question is also yes, given the nature of the questions asked, the length of the interview, the extent of Deputy Sechrist's involvement, and the differential treatment of Deacon as compared to Daniel.

¶ 65 After Deacon arrived at the principal's office, he began to be questioned by Principal Whitaker, while Deputy Sechrist sat by the principal's side and observed throughout. However, Deputy Sechrist's testimony regarding the content of the interview was not exhaustive. He offered three slightly differing accounts of what happened: (1) initially testifying that Deacon apparently volunteered the information about the marijuana sale without being prompted; (2) then clarifying that Principal Whitaker had asked Deacon to tell them "what had taken place," whereupon Deacon confessed; and (3) finally stating that Principal Whitaker had simply asked Deacon "where have you been for the last few days," to which Deacon responded that he had skipped school for fear of being punished for the marijuana sale.

¶ 66 Though it is not clear precisely what questions Principal Whitaker asked Deacon, it *is* clear that Deacon's grandmother was not contacted until after Deacon had already confessed in response to the questioning. Deputy Sechrist also stated that "not very many questions were even asked" prior to the grandmother being called—but the very phrasing of this statement implies that multiple questions were asked before Deacon's guardian was notified, and that enough were asked to elicit a confession. Under these circumstances, both Principal Whitaker and Deputy Sechrist should have known that asking these questions of a 13-year-old (who was already the suspect of a criminal investigation and likely knew he was a suspect, and who had not yet been afforded any ability to contact his guardian), would have been likely to result in an incriminating statement.

¶ 67 We also cannot ignore the fact that Deacon received a very different treatment than his classmate Daniel. After Daniel was found with marijuana on the school bus, he was escorted by Deputy Sechrist to the principal's office, and his father was immediately contacted. Once inside the principal's office, Daniel asked whether he could "speak freely," but Deputy Sechrist expressly instructed him to "wait until your daddy gets here." Daniel was not asked any questions until after his father arrived.

¶ 68 In contrast, Deacon was not advised to keep quiet until his guardian arrived, and Deacon's guardian was not even contacted until after he had confessed. This unequal treatment underscores that the purpose of interviewing Deacon was to conduct a criminal investigation, not to investigate whether he had broken a school rule about absences. Unlike Daniel, Deacon did not have access to a guardian or other adult concerned with his best interest during the questioning, demonstrating that the purpose of the questioning was to elicit an inculpatory response from a criminal suspect, rather than to mete out school discipline for missing class.

¶ 69 As the State notes, it is true that Deputy Sechrist himself asked no questions of Deacon during the interview, based on Deputy Sechrist's testimony. However, as in *In re K.D.L.*, Deputy Sechrist's presence during the entirety of the interview "significantly increased the likelihood" that Deacon "would produce an incriminating response to the principal's questioning." 207 N.C. App. at 461, 700 S.E.2d at 772. Moreover, we find it relevant that Deputy Sechrist was intimately involved in the investigation from the outset. He investigated the original incident on the bus, escorted Daniel to the principal's office, warned Daniel not to speak prior to his father arriving, and was present throughout Daniel's questioning. Prior to speaking with Deacon, Deputy Sechrist had also performed lab tests on the substance recovered from Daniel to confirm it was marijuana. On the day of questioning Deacon, Deputy Sechrist was in uniform, he sat on the same side of the desk as the principal, and was present for the entire interview. Under these circumstances, Deputy Sechrist was more than just an observer to a school disciplinary conversation—he was a law enforcement officer investigating a crime.

¶ 70 Finally, we note that the trial court relied on an erroneous legal standard in concluding that Deacon's interview was not a custodial interrogation. The trial court based its determination primarily on the "fact" that Deputy Sechrist was not "some strange officer in uniform" and that it was "not unusual in a school setting" for a student "to be called into a principal's office." This is not the test for whether a *Miranda* warning is required.

¶ 71 First, aside from the fact that there was no evidence in the record to support the finding that Deputy Sechrist was not a "strange officer in uniform," it bears emphasizing that the *Miranda* inquiry is an *objective*, not subjective, test. *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). Any supposed familiarity between a 13-year-old and an investigating officer is irrelevant under a proper *Miranda* inquiry. *Id.* at 668-69 (relying on a suspect's "prior history with law enforcement" in a *Miranda* analysis is "improper" because "[t]he inquiry turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation") (internal marks and citation omitted).

¶ 72 Rather, the objective *Miranda* inquiry turns on (1) "the circumstances surrounding the interrogation"; and (2) whether "given those circumstances," a reasonable 13-year-old would "have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The circumstances here were that Deacon, a 13-year-old suspect in a criminal investigation, was called out of class to be questioned in the principal's office alongside the SRO; was neither told he was free to leave nor that he did not have to answer questions; and was not provided the option of contacting his guardian until after he had already confessed.

¶ 73 The trial court was required to take these circumstances into account to determine whether a reasonable 13-year-old in Deacon's position would have felt free to terminate the encounter and leave. There is no indication in the trial court's order that it considered or applied this standard. Accordingly, the trial court erred in denying the motion to suppress Deacon's confession; in concluding that the questioning did not amount to a custodial interrogation; and in concluding that Deacon was not entitled to the protections of the Fifth Amendment or N.C. Gen. Stat. § 7B-2101.

III. Conclusion

¶ 74 The trial court erred in concluding that Deacon's confession was not the product of a custodial interrogation and in denying the motion to suppress Deacon's confession. We therefore reverse and remand the order of the trial court.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

IN RE E.W.P.

No. COA20-181

Filed 20 April 2021

1. Jurisdiction—recommitment hearing—not guilty by reason of insanity—request for outside visits—section 122C-62

The trial court had jurisdiction to determine that respondent, who was involuntarily committed after being found not guilty by reason of insanity (of murder and attempted murder), should not be allowed a lower level of supervision for public visits despite a request from respondent's treatment team to change the ratio of supervision from one-to-five (staff to patients) to one-to-ten. Pursuant to N.C.G.S. § 122C-62(b)(4), respondent had no right to have outside visits unless granted by the court, and it was within the court's jurisdiction to set the parameters, including the level of supervision, for that privilege.

2. Mental Illness—involuntary commitment—request for outside visits and outings—section 122C-62

The trial court did not abuse its discretion by denying respondent, who had been involuntarily committed after being found not guilty by reason of insanity of murder and attempted murder, family-supervised off-campus visitation and outings supervised at a ten-to-one rather than a five-to-one ratio (of patients to staff). There was substantial evidence to support the court's findings and decision, including testimony from respondent's psychiatrist that respondent remained dangerous due to his permanent lack of insight into why he committed the acts that led to the criminal charges and that the staff overseeing outside visits was unarmed.

Appeal by respondent from order entered 26 June 2019 by Judge Alan Z. Thornburg in Avery County Superior Court. Heard in the Court of Appeals 23 February 2021.

Robert T. Broughton, *Special Deputy Attorney General*, *for Petitioner-Appellee.*

John F. Carella, *Carella Legal Services*, *for Respondent-Appellant.*

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 On 8 March 2004, Respondent was involuntarily committed to Broughton Hospital after being found incapable of proceeding to trial in Avery County Superior Court on charges including first degree murder, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Specifically, Respondent's charges involved the murder of Avery County Sherriff's Deputy Glenn Hicks and the attempted murder of Deputy Ralph Coffey. In 2013, the trial court found Respondent to be capable of proceeding to trial and to have a valid defense of insanity. The trial court dismissed the charges and ordered Respondent to be involuntarily committed at Central Regional Hospital pursuant to N.C. Gen. Stat. §§ 15A-1321 and 122C-268.1. The trial court retained jurisdiction over Respondent as a defendant found not guilty by reason of insanity, or an "NGRI defendant."

¶ 2 Dr. Wolfe, a forensic psychiatrist at Central Regional Hospital, has been Respondent's primary treating psychiatrist for over five years. At Respondent's 2017 recommitment hearing, Dr. Wolfe requested "(1) an increase from two hours to four hours of daily campus ground passes; (2) an increase of the [patient-to-staff] ratio from one-to-five to one-to-ten; and (3) quarterly, two-hour family supervised passes within thirty miles of the hospital campus." The trial court denied those requests. Respondent appealed from the 27 June 2017 recommitment order, and this Court found no error in an unpublished opinion issued on 6 November 2018. The North Carolina Supreme Court denied a petition for discretionary review.

¶ 3 On 12 June 2019, Respondent's case came on for a recommitment hearing in Avery County Superior Court before the Honorable Alan Z. Thornburg. Dr. Wolfe testified that what keeps Respondent in the hospital "is his murder, NGRI, and the dangerousness to others because of that incident." Dr. Wolfe testified that Respondent's lack of insight, which she believed to be permanent, "causes his dangerousness." Dr. Wolfe testified Respondent remains convinced that he was protecting himself and acting in self-defense in 2003, and "that idea is always going to be there."

¶ 4 During the 2019 recommitment hearing, Respondent's treatment team sought an order granting increased privileges for Respondent. The increased privileges sought included more ground pass hours and a move to a lesser degree of supervision, specifically an increased patient-to-staff ratio, on public trips. Dr. Wolfe testified that

increased privileges would be necessary to allow Respondent to work toward the goal of community reintegration.

¶ 5 However, Dr. Wolfe's testimony tended to show the need for a greater patient-to-staff ratio was in part based on the hospital's "budgetary concern." In her words, hospital staff were "always under scrutiny to decrease . . . staff spending. . . ." When asked on direct examination whether the purpose of the request for a greater patient-to-staff ratio was "essentially to see how [Respondent] was going to behave," Dr. Wolfe's response was: "I don't think that it's representative as much to see how he's going to behave as opposed to availability of staff in order to take patients out." Dr. Wolfe testified that the staff member who accompanies patients into the public places is unarmed, and that "most of the patients" on these public trips "have killed someone."

¶ 6 In its 26 June 2019 order, the trial court found as fact that Respondent continues to suffer from mental illness of delusional disorder and remains dangerous to others based on his past actions. The trial court found that the requested increase from two to four hours for grounds passes was merited. Regarding the two other requests, the trial court found as follows:

> b. As to the request for a decrease in the staff to patient supervision ratio . . . The Court finds that decreasing the level of supervision for off-hospital campus activities . . . could pose an increased risk to public safety. In light of this, this Court in its discretion determines that a decrease in Respondent's staff to patient supervision ratio for off-campus activities is not merited and is not allowed.
>
> c. As to the request for two hour family-supervised off campus passes within 30 miles of Central Regional Hospital, this Court finds that . . . other alternatives exist whereby hospital staff could supervise such off-campus visits and facilitate visits by the Respondent's family. In light of this evidence, this Court [in] its discretion determines that two hour family-supervised off campus passes within 30 miles of Central Regional Hospital are not merited, and are not allowed.

¶ 7 Respondent filed notice of appeal on 1 July 2019.

II. Jurisdiction

¶ 8 Jurisdiction lies in this court pursuant to N.C. Gen. Stat. § 122C-272 (2019) over an appeal from a final judgment of a superior court. The issue of a court's subject matter jurisdiction may be raised at any time, even on appeal. *State v. High*, 230 N.C. App. 330, 334, 750 S.E.2d 9, 12 (2013).

III. Issues

¶ 9 Respondent contends (1) the trial court erred by ordering a one-to-five ratio of staff supervision for Respondent because the trial court lacked jurisdiction to overrule qualified medical professionals on the decision; in the alternative, Respondent contends (2) the trial court abused its discretion by denying Respondent the ability to obtain family-supervised off-campus visitation and outings supervised at a one-to-ten ratio.

IV. Analysis

A. Trial Court Jurisdiction

¶ 10 **[1]** Respondent argues the trial court erred by ordering a one-to-five ratio of staff supervision because the court lacked jurisdiction to overrule qualified professionals on this decision. Whether a court has jurisdiction is a question of law reviewed *de novo* on appeal. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). N.C. Gen. Stat. § 122C-62 is instructive regarding the basis for a trial court's jurisdiction over an NGRI defendant such as Respondent. N.C. Gen. Stat. § 122C-62(b) states in relevant part:

> (b) Except as provided in subsections (e) and (h) of this section, each adult client who is receiving treatment or habilitation in a 24-hour facility at all times keeps the right to:
>
> . . .
>
> (4) Make visits outside the custody of the facility unless:
>
> a. Commitment proceedings were initiated as the result of the client's being charged with a violent crime, including a crime involving an assault with a deadly weapon, and the respondent was found not guilty by reason of insanity or incapable of proceeding;
>
> . . .

> A court order may expressly authorize visits otherwise prohibited by the existence of the conditions prescribed by this subdivision[.]
>
> . . .
>
> (e) No right enumerated in subsections (b) or (d) of this section may be limited or restricted except by the qualified professional responsible for the formulation of the client's treatment or habilitation plan. . . .

N.C. Gen. Stat. § 122C-62(b) (2019).

¶ 11 The basis of Respondent's jurisdictional argument rests on the contention that he remained "in the custody" of the facility during his outings off the premises of the facility. Therefore, Respondent contends, the trial court had no jurisdiction to "overrule" the requests of his treatment team for lesser supervision on the outings. This Court, however, has interpreted N.C. Gen. Stat. § 122C-62 to hold "visits outside the custody of the facility include . . . visits off the premises." *In re Williamson*, 151 N.C. App. 260, 266, 564 S.E.2d 915, 919 (2002). In *Williamson*, this Court held an NGRI defendant "does not have a protected liberty interest in obtaining passes" for visits outside the custody of the facility. *Id.* at 266, 564 S.E.2d at 919.

¶ 12 As an NGRI defendant, Respondent falls within the class of "adult clients" subject to N.C. Gen. Stat. § 122C-62(b)(4). Section (b)(4) disallows NGRI clients receiving treatment in a 24-hour facility "the right to . . . make visits outside the custody of the facility" without a "court order" that "expressly authorize[s]" such a visit. The trial court granted Respondent the right to make visits outside the custody of the facility at a one-to-five ratio.

¶ 13 Pursuant to N.C. Gen. Stat. § 122C-62(e), *if* such a right is granted to an NGRI defendant, only the qualified professional responsible for the formulation of the client's treatment or habilitation plan can limit or restrict it. N.C. Gen. Stat. § 122C-62(e) (2019). If such a right is not granted to an NGRI defendant at all, N.C. Gen. Stat. § 122C-62 does not grant the qualified professional the ability to grant it herself. Similarly, no part of N.C. Gen. Stat. § 122C-62 gives the qualified professional the ability to unilaterally expand the parameters of confinement and rights established by the trial court within the statutory structure set forth in N.C. Gen. Stat. § 122C as to an NGRI defendant. Only the trial court can grant the right to make visits outside the custody of the facility pursuant to N.C. Gen. Stat. § 122C-62, hence, Respondent's argument that the trial

court effectively "overruled" a qualified professional on the decision to grant a right is without merit.

¶ 14 "There exists a need to monitor and keep the public safe from individuals (such as respondent) that often times have committed violent, dangerous or other criminal acts resulting in their involuntary commitment." *Williamson* 151 N.C. App. at 268, 564 S.E.2d at 920. We find the government's interest in keeping the public safe, in conjunction with the plain language of N.C. Gen. Stat. § 122C-62, provides the trial court jurisdiction to determine the parameters of the confinement of an NGRI defendant within the statutory structure of N.C. Gen. Stat. § 122C, including the ability to leave the facility to which they are validly committed.

B. Abuse of Discretion

¶ 15 **[2]** Respondent argues in the alternative the trial court abused its discretion by declining Respondent's request for family-supervised off-campus visitation and outings supervised at a one-to-ten ratio. Abuse of discretion is the appropriate standard by which an appellate court reviews the determination of a trial court to grant or deny out of custody privileges for an NGRI defendant. *Id.* at 260, 564 S.E.2d at 919. "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 899, 787 S.E.2d 1, 15 (2016) (citation omitted).

¶ 16 Substantial evidence exists in the record to support the trial court's findings of fact. Specifically, Dr. Wolfe's testimony that Respondent's permanent lack of insight "causes his dangerousness" provided sufficient support for the trial court's decision to decline Respondent's request for family-supervised off-campus visitation. Further testimony from Dr. Wolfe that the staff member who accompanies patients into the public places is unarmed, and that "most of the patients" on these public trips "have killed someone," provided sufficient support for the trial court's decision to decline Respondent's request for outings supervised at a one-to-ten ratio. This Court therefore finds the trial court did not abuse its discretion by declining Respondent's request for family-supervised off-campus visitation or outings supervised at a one-to-ten ratio.

V. Conclusion

¶ 17 We find the trial court's jurisdiction was proper based on the plain language of N.C. Gen. Stat. § 122C-62. Further, we find the trial court did not abuse its discretion, as substantial evidence existed in the record to

support the trial court's findings of fact. For those reasons, we affirm the orders of the trial court.

AFFIRMED.

Judges ARROWOOD and GORE concur.

IN THE MATTER OF L.G.A.

No. COA20-148

Filed 20 April 2021

1. Child Custody and Support—motion to continue custody hearing—section 7B-803—mother's pending criminal charges—extraordinary circumstances not shown

In a custody matter, the trial court properly denied the mother's motion to continue a review hearing, made due to the mother's concerns that she might incriminate herself in her pending criminal matter (for communicating threats), where the mother did not carry her burden under N.C.G.S. § 7B-803 of showing that extraordinary circumstances existed to justify a continuance. Not only were the criminal charges unrelated to the juvenile petition, but the trial court offered safeguards to protect the mother's due process rights.

2. Child Custody and Support—custody granted to father—ability to parent—sufficiency of findings

The trial court's order granting custody of a couple's son to the father, despite the guardian ad litem's recommendation that the father be granted visitation only, was supported by the court's findings of fact, which were in turn supported by the evidence. Although the trial court should not have taken judicial notice of the effectiveness of a social services program, a subject which was not well established or authoritatively settled, the remaining findings regarding the father's progress on his case plan were sufficient to support the trial court's conclusion that the father should be granted sole legal and physical custody.

3. Child Visitation—fees for professional supervision—mother ordered to pay—findings regarding present ability to pay

In a custody matter, the trial court erred by ordering a mother to pay the costs of professional supervision of visits with her son

without making findings regarding the mother's present ability to pay those costs, particularly where the mother's financial situation was likely to be different after her release from incarceration. On remand, the court was also directed to make findings regarding the criteria and costs of a professional supervisor.

Appeal by respondent-mother from order entered 25 November 2019 by Judge Micah J. Sanderson in District Court, Cleveland County. Heard in the Court of Appeals 23 February 2021.

Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.

Benjamin J. Kull, for respondent-appellant-mother.

Michelle FormyDuval Lynch, for Guardian ad Litem.

STROUD, Chief Judge.

¶ 1 Mother appeals from a review hearing order granting sole legal and physical custody of their minor child to Father. Mother argues the trial court erred by denying her motion for a continuance, by concluding it was in Lloyd's[1] best interest for Father to have full custody, and by ordering her to pay for professional visitation supervision without determining her present ability to pay. We affirm as to the denial of her motion to continue and the decision to grant full custody of Lloyd to Father but vacate and remand for additional findings on Mother's present ability to pay for professional visitation supervision.

I. Background

¶ 2 Mother and Father have one child together, Lloyd. One week after Lloyd's birth, the parties were involved in an act of domestic violence while Father was holding Lloyd. Cleveland County Department of Social Services ("DSS") took custody of Lloyd following this incident, and he was adjudicated neglected on 15 December 2017. Father then regained custody of Lloyd, but after another incident of domestic violence Lloyd was placed in the custody of DSS.

¶ 3 On 2 May 2018 Mother and Father stipulated to findings of fact related to the second incident of domestic violence, and Lloyd was adjudicated as a neglected juvenile for a second time. Mother previously

1. Pseudonyms are used to protect the identity of the juvenile.

had several attorneys withdraw as counsel, and following a 1 May 2019 review hearing, the trial court indicated Mother's visitation would revert to a previous schedule if she was rude to a social worker. The next day Mother demanded to meet with her social worker, complained about the visitation plan entered the day before, and made 14 separate calls to DSS. Mother threatened the social worker and was asked to leave DSS's premises.

¶ 4 Mother was convicted of misdemeanor communicating threats against a previous social worker, and a condition of her bond was that she was prohibited from contacting her previous social worker. Mother violated the condition of her bond by texting her previous social worker; as a result, her bond increased, and she was prohibited from entering DSS's premises.

¶ 5 Father filed a review motion on 9 August 2019 and requested custody of Lloyd. Mother filed a motion to continue the hearing, but her motion was denied. Father's motion was heard on 25 September 2019. An order following the review hearing was entered on 25 November 2019 and granted full physical and legal custody to Father. Mother was incarcerated at that time and the order provided for supervised visitation for Mother upon her release from jail. Mother timely appealed from the order.

II. Continuance

¶ 6 **[1]** Mother argues, "[t]he court erred by denying [her] motion for a brief continuance because the importance of the constitutional and parental interests at stake far outweighed any competing interests."

A. Standard of Review

¶ 7 "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). "If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable." *Id.* at 517, 843 S.E.2d at 91 (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)). "[D]enial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that [s]he suffered prejudice as a result of the error." *Id.* (quoting *State v. Walls*, 342 N.C. at 24-25, 463 S.E.2d at 748).

¶ 8 Mother's motion for a continuance alleged constitutional violations of her right to due process, and that she would "be obligated to assert her Fifth Amendment right to not incriminate herself in her criminal matter . . . if the hearing is scheduled prior to her arraignment date during the October 7, 2019 trial term." Because Mother raised the constitutional basis for her argument before the trial court, we review this issue *de novo*. *See id.*

B. Analysis

¶ 9 Mother argues, "[t]he court improperly forced [her] to choose between exercising her right not to incriminate herself and testifying regarding the fate of her son." In her motion, Mother made general allegations about ongoing plea negotiations in her pending criminal charges and alleged she was scheduled to appear in superior court on the criminal matters in October 2019, when all of the criminal matters "will then be resolved in their entirety if she so chooses to tender a plead [sic] of guilty." She also alleged she was a "material witness" in defense of Father's motion for review, although she did not specify any particular issues her testimony may address. She did not allege any need for additional evidence, reports, or assessments that the court had requested or any other additional information regarding the child's best interests. We note that Father's motion for review did not make any allegations regarding Mother other than a reference to their history of a "toxic" relationship with "incidents of domestic violence," referring to incidents that had already been addressed in prior hearings. The motion for review addressed Father's own progress since the prior orders, specifically his completion of "the IMPACT program," his successful unsupervised visitation for over two months, his residence in a "safe and stable home," his "resources to solely provide for the minor child's care," his completion of all requirements in the trial court's dispositional order, and the temporary placement of the child with him for care when the child was sick and the foster parents "were unable to find coverage for him."

¶ 10 Continuances in this context are governed by North Carolina General Statute § 7B-803:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct

> expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. Resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.
>
> N.C. Gen. Stat. § 7B-803 (2013). Additionally, N.C. Gen. Stat. § 7B-1109(d) provides: "Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance." *Id.* § 7B-1109(d) (2013).

In re C.J.H., 240 N.C. App. 489, 493, 772 S.E.2d 82, 86 (2015).

¶ 11 Under North Carolina General Statute § 7B-803, Mother had the burden of demonstrating good cause for a continuance, which may include the need for additional time "to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery." N.C. Gen. Stat. § 7B-803 (2019). Since she did not allege a need for this type of information, Mother had the burden to demonstrate "extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile." *Id.*

¶ 12 Mother's sole basis for requesting a continuance was that she was awaiting trial for charges of communicating threats to a previous social worker and assistant district attorney. She argues she was effectively prevented from testifying to avoid waiver of her Fifth Amendment rights against self-incrimination. Based upon her argument, any parent who has pending criminal charges might be able to delay hearings under Chapter 7B indefinitely, on the theory that the parent may need to present some testimony that could be used against her in a pending criminal charge, even if the charge is unrelated to the "same transaction or occurrence as the juvenile petition." *Id.* But North Carolina General Statute § 7B-803 does not support this argument, as it provides that even "[r]esolution of

a pending criminal charge against a respondent arising out of the *same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance*." *Id.* (emphasis added). Thus, even if the criminal charges against Mother had arisen from the "same transaction or occurrence as the juvenile petition," she would still have to demonstrate *other* extraordinary circumstances to support a request for continuance. *See id.* The charges against Mother did not arise from the "transaction or occurrence" which led to the juvenile petition; they arose after the petition.

¶ 13 The trial court discussed Mother's motion for a continuance and all parties indicated that they did not intend to question her if she chose to testify:

> We then discussed testimony, was presented to the Court that Mr. Caulder nor Mr. Wilson nor Ms. Dow had any intent of questioning [Mother] at all. Did not say they wouldn't but said that they were not planning on asking her any questions at all. But, she one hundred percent will not be called as an adverse witness by any parties with the exception of [her own attorney].

The trial court also offered to act in a gate keeper role to prevent someone saying something "that could potentially harm their criminal case." But Mother chose not to testify at the "advice of her criminal counsel, her GAL and [her own counsel]."

¶ 14 The trial court denied Mother's motion for a continuance in open court:

> [I]n this case mom had a motion to continue based on her "inability" to testify because she had pending criminal cases. This motion was denied and will still find mom had the ability to testify and is electing not to testify. It is not an inability. She does have a choice and she is choosing not to.

The trial court provided adequate safeguards to protect Mother's due process rights. The trial court properly determined that Mother was not statutorily entitled to a continuance, and Mother has failed to demonstrate any violation of her constitutional rights in the denial of her motion to continue. We affirm the trial court's decision to deny Mother's motion to continue.

III. Custody

¶ 15 **[2]** Mother argues, the trial "court erred by concluding it was in Lloyd's best interest to grant full custody to [Father] because (1) the court failed to account for the long-standing concerns regarding [Father's] ability to parent and (2) its ruling directly contradicted the GAL's recommendation that [Father] only be allowed overnight visits."

A. Standard of Review

> Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." . . . We review a trial court's determination as to the best interest of the child for an abuse of discretion.

In re J.H., 244 N.C. App. 255, 268-69, 780 S.E.2d 228, 238 (2015) (citations omitted).

B. Finding of Fact 46

¶ 16 Mother challenges Finding of Fact 46 which states, "In regards to the Respondent Father, there have been no criminal allegations, charges, or convictions for any type of domestic violence or any civil domestic violence claims in 50B Court." Mother argues "[t]his is simply not true." Mother is correct that some of these things had happened in the past, and these matters were addressed in the trial court's prior orders. But, in context, this finding addresses Father's progress since the former disposition of the case:

> 44. *At the former disposition of this case*, the Respondent Father was required to complete the domestic violence IMPACT Program, complete a psychological evaluation and parenting classes, enroll for counseling at Phoenix Counseling Center, and to maintain safe and stable housing.
>
> 45. *Since the former disposition of the case*, there have been no domestic violence issues with Respondent Father and he has maintained stable and suitable housing with [his ex-wife].

> 46. In regards to the Respondent Father, there have been no criminal allegations, charges, or convictions for any type of domestic violence or any civil domestic violence claims in 50B Court.

(Emphasis added.) This finding is supported by competent evidence, and Mother's objection is overruled.

C. Finding of Fact 51

¶ 17 Mother challenges the portion of Finding of Fact 51 which deals with the duration of the IMPACT program:

> 51. The respondent father enrolled in and completed the IMPACT Program in July 2019. The Court has knowledge that the IMP ACT Program is a minimum of 26 weeks, and in this case the Respondent Father completed 30 weeks.

¶ 18 Father testified that he completed the IMPACT abuse intervention program. In the record, there is a letter from an IMPACT social worder which states Father was behind schedule to complete the program in 26 weeks. Accordingly, this finding is based on competent evidence.

D. Finding of Fact 53

¶ 19 Mother argues the trial court "took improper judicial notice" in Finding of Fact 53:

> 53. The Court takes judicial notice of the widely-known benefits of the IMPACT program and how it has specifically improved the Respondent Father's behavior and has helped him to maintain a calm demeanor during direct examination and cross examination.

¶ 20 The Guardian ad Litem argues that Mother

> did not object to this *finding as the trial court announced it at the hearing*, and therefore it is not proper for appellate review. *See* N.C. R. App. Proc. 10(a)(1). Respondent mother presented no evidence to dispute this finding by the trial court and has not shown there is any reasonable dispute as to the known benefits of the IMPACT program. Accordingly, this assignment of error should be dismissed.

(Emphasis added.)

¶ 21 We first reject the Guardian ad Litem's argument regarding waiver of review of this issue based on Mother's failure to "object to this finding as the trial court announced it at the hearing." Under the Rules of Appellate Procedure, parties are not required to object to a trial court's findings of fact from the bench to preserve the issue for appellate review:

> Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved *or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law*, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, *may be made the basis of an issue presented on appeal.*

N.C. R. App. P. 10(a)(1) (emphases added). In addition, an order is not final until "it is reduced to writing, signed by the judge, and filed with the clerk of court . . . ." N.C. Gen Stat. § 1A-1, Rule 58. The trial court is not required to announce its rulings at the conclusion of a hearing and often will take the case under advisement before later issuing a written order or advising the parties and counsel of the ruling.

¶ 22 Here, at the conclusion of the hearing, the trial court directed Father's counsel to prepare the written order and announced a general summary of the findings of fact and other provisions in the order, but Mother's counsel did not object, and should not have objected, to the trial court's rendition of its ruling, as there is no legal basis for an "objection" in this context. The trial court mentioned "judicial notice" during the rendition of the order, but judicial notice was not mentioned during the presentation of evidence, other than in reference to the prior orders entered in this case. And even when a trial judge announces a ruling and findings in open court, the written, signed, and filed order may not have exactly the same provisions as announced at the conclusion of the hearing. A party would have no way of "objecting" to a provision of the order until after the order is written, signed, and filed; that is the purpose of an appeal. Thus, we address Mother's argument as to whether the trial court took improper judicial notice of "the benefits of the IMPACT program."

¶ 23 Judicial notice is governed by Rule 201 of the North Carolina Rules of Evidence:

> (b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When discretionary. — A court may take judicial notice, whether requested or not.
>
> (d) When mandatory. — A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard. — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201.

¶ 24 This Court has noted that an "indisputable fact" under Rule 201

> " . . . 'is so well established as to be a matter of common knowledge.' Conversely, a court cannot take judicial notice of a disputed question of fact." "By taking judicial notice of a fact so commonly known, the court avoids the needless formality of introducing evidence to prove an incontestable issue."

Hinkle v. Hartsell, 131 N.C. App. 833, 836, 509 S.E.2d 455, 458 (1998) (citations omitted).

¶ 25 Here, the record includes evidence regarding Father's own participation in the IMPACT program, but there was no evidence regarding the overall success of the program and no indication that the program's beneficial effects were "so well established as to be a matter of common knowledge." *Id.* In this case, the trial court was not so much taking judicial notice of the details or historical record of the IMPACT program as noting a fact known to the trial judge, based upon his personal experience, but not an "indisputable" matter which is a "matter of common knowledge." *See id.* While the trial court's own personal knowledge and experience must and should inform any ruling, the specific findings of fact must be based upon the evidence presented in the case and not upon

the judge's own memory or knowledge. As this Court noted in *Hensey v. Hennessy*, "[A] judge's own personal memory is not evidence." 201 N.C. App. 56, 67, 685 S.E.2d 541, 549 (2009). "Appellate review of the sufficiency of the evidence to support the trial court's findings of fact is impossible where the evidence is contained only in the trial judge's memory." *Id.* at 68, 685 S.E.2d at 549.

¶ 26 "We have held that '[a] matter is the proper subject of judicial notice only if it is "known," well established and authoritatively settled.' Conversely, '[a]ny subject . . . that is open to reasonable debate is not appropriate for judicial notice.' " *In re R.D.*, 376 N.C. 244, 852 S.E.2d 117, 132 (2020) (alterations in original) (citations omitted). Although the trial court no doubt had personal knowledge of the IMPACT program in general and had apparently seen good results from the program, the benefits of the IMPACT program are not "well established" or "authoritatively settled" in the manner appropriate for judicial notice under Rule 201. Accordingly, the portion of this finding regarding the "widely-known benefits of the IMPACT program" is not supported by the evidence. But the remainder of Finding of Fact 53—that the IMPACT program had "helped [Father] to maintain a calm demeanor during direct examination and cross examination" is supported by the record and was not based upon judicial notice. The record includes evidence about Father's participation in the program, and the trial court observed Father's demeanor at the hearing. The pertinent portion of the challenged finding was the effect of the IMPACT program on Father, not its general success rate or reputation, and this portion of Finding of Fact 53 is supported by the record.

E. Finding of Fact 58

¶ 27 Mother argues in Finding of Fact 58 the trial court "made an unreasonable, unsupported inference about the impact of [Father's] mental disability on his ability to parent":

> 58. In spite of a documented mental disability of the Respondent Father, upon observing him on the witness stand, and although he did not recall every date, the Court has no concerns about his mental capacity or parenting capabilities. He was able to recall specific dates, locations and other information about exhibits when presented by his counsel and was able to read documents that were provided to him.

¶ 28 Here, Mother's argument goes to the trial court's assessment of the weight and credibility of the evidence and its evaluation of Father's

demeanor, and these are matters well within the discretion of the trial court to determine as the finder of fact:

> The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness. The demeanor of a witness on the stand is always in evidence. All of the findings of fact regarding respondent's in-court demeanor, attitude, and credibility, including her willingness to reunite herself with her child, are left to the trial judge's discretion. Therefore, any of the findings of fact regarding the demeanor of any of the witnesses are properly left to the determination of the trial judge, since she had the opportunity to observe the witnesses.

Balawejder v. Balawejder, 216 N.C. App. 301, 318-19, 721 S.E.2d 679, 689-90 (2011) (citations omitted) (quoting *Matter of Oghenekevebe*, 123 N.C. App. 434, 440-41, 473 S.E.2d 393, 398-99 (1996)). This argument is overruled.

F. Finding of Fact 60

¶ 29 Mother argues Finding of Fact 60 "inexplicably ignores the well-documented, long-standing concerns regarding [Father's] ability to parent":

> 60. The Department of Social Services has not offered any concerns regarding the ability of the Respondent Father to parent capably and neither have any other third parties offered any concerns as to the same.

¶ 30 Again, as with the trial court's references to domestic violence in Finding of Fact 46, Mother's argument hearkens back to earlier incidents and hearings in the case, but in context, the trial court was referring to the evidence presented at this hearing and Father's circumstances as of that date. Mother is correct that DSS did have concerns regarding Father in the past, but in addressing Father's motion for review, based upon the evidence presented at this hearing, the trial court's finding is supported by the record.

¶ 31 At the hearing on Father's motion for review, a child permanency worker with DSS testified that she had no concerns regarding Father's ability to parent and recommended physical and legal custody be returned to Father. The GAL also testified that they were not opposed to custody being returned to Father. This finding is supported by competent evidence.

G. Conclusion of Law 5

¶ 32 Mother argues, "[t]he findings do not support the conclusion that it was in Lloyd's best interest that [Father] be granted full custody":

> 5. It is in the best interest of the minor child that the Respondent Father be granted the sole legal and physical custody of the minor child with a provision for limited supervised visitation by the Respondent Mother, when she is no longer being held in custody.

¶ 33 We have already determined the trial court's findings of fact were, with the small exception of the reference to "judicial notice" discussed above, are supported by the evidence. Thus, for purposes of appellate review, we must consider whether all of the findings of fact support the trial court's conclusion of law.

¶ 34 The trial court's findings demonstrate that after the previous review order, Father's progress with his plan showed his ability to safely parent Lloyd. In contrast, Mother's actions since the previous review order led to her arrest and incarceration instead of progress in becoming a suitable parent. This conclusion is supported by the trial court's findings of fact, and the trial court did not abuse its discretion in making this determination.

IV. Payment for Professional Supervision

¶ 35 **[3]** Mother argues the trial court "erred by ordering [Mother] to pay for professional supervision for her visits because it made no findings regarding (1) her present ability to pay or (2) the cost of professional supervision."

A. Standard of Review

¶ 36 This Court reviews the trial court's decree as to supervised visitation for abuse of discretion. *In re E.M.*, 249 N.C. App. 44, 57, 790 S.E.2d 863, 874 (2016). In particular, the trial court must consider whether the parent would actually have the ability to exercise the visitation as ordered. *See id.* "Failure to make [a finding on whether a parent is able to pay for supervised visitation once ordered] requires this Court to vacate the portion of the order requiring that the visitation be at Respondent's expense and to remand for entry of a new order containing the required findings of fact." *Id.*

B. Analysis

¶ 37 Mother argues, "[f]indings about ability to pay must address a parent's present—not past—ability." We agree.

¶ 38 Here the trial court found in relevant part:

> 82. That upon the mother's release from jail, the Court does make provisions as follows for the Respondent Mother to have visitation with the minor child as follows:
>
> a. The Respondent Mother may exercise supervised visitation when she is released from custody for one, two-hour period every two weeks.
>
> b. If the parties cannot agree on a visitation date, then the supervised visitation will be every other Thursday from 2:00 PM to 4:00 PM.
>
> c. The visitation will be supervised by a third-party upon agreement of the parents; however, if the parents cannot agree on a third-party supervisor, the Respondent Mother will be responsible to retain a professional supervisor for such a purpose. Should Respondent Mother retain a professional supervisor, Respondent Father cannot refuse such visitation based on his disagreement with the Respondent Mother's choice in professional supervisor.
>
> d. Respondent Mother does have the financial ability to retain a professional supervisor for visitation. In previous hearings, Respondent Mother has informed this court that prior to being incarcerated she worked two jobs at the same time. Respondent Mother has also had the financial ability to retain private counsel. The Respondent mother has previously financially been able to post a $10,000 secured bond. Respondent Mother has also previously stated through counsel, other than Attorney Hughes, that

> she has the ability to post the current bond but is choosing not to. All of these previous statements do satisfy this court that she does have the financial ability to comply with and retain a professional supervisor for future supervised visitation.
>
> e. Respondent Father and Respondent Mother are not to have any contact with one another. Respondent Mother must have an agreed upon third-party supervisor or a professional supervisor to make such visitation arrangements with the Respondent Father.

¶ 39 Even though Mother previously had two jobs and the ability to post a secured bond, these findings do not address her ability to pay for supervised visitation following her incarceration, when the supervised visitation would begin. First, since Mother's criminal charges were still pending, there was no evidence as to when she would be released from incarceration or what her circumstances would be at that time. There was no evidence Mother's prior employment would still be available to her after her release. All the evidence would suggest that her financial situation will likely be different when she is able to resume visitation. We vacate the portion of the order requiring Mother to pay for supervised visitation and remand for additional findings of fact on Mother's ability to pay supervision fees at the relevant time, after she is released from incarceration and able to exercise visitation. In addition, the trial court shall make findings on the costs associated with a professional supervisor and who may qualify as a professional supervisor.

V. Conclusion

¶ 40 For the foregoing reasons, we affirm the trial court's denial of Mother's motion to continue and the order granting full custody of Lloyd to Father, but we vacate the provisions regarding Mother's financial responsibility for professional supervision and remand for additional findings regarding the qualifications of a "professional" supervisor, the cost of supervision, and Mother's ability to pay for professional supervision. The trial court shall receive additional evidence as needed to address this issue on remand.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges MURPHY and GRIFFIN concur.

IN RE UNIFI MFG., INC.

[277 N.C. App. 61, 2021-NCCOA-138]

IN THE MATTER OF THE APPEAL OF UNIFI MANUFACTURING INC., APPELLEE

No. COA20-300

Filed 20 April 2021

Taxation—ad valorem tax valuation—rebuttable presumption of validity—appraisal methods—functional obsolescence of property

The Property Tax Commission properly reversed a county's ad valorem tax assessment of a company's textile manufacturing facility on grounds that the company rebutted the assessment's presumptive validity and the county failed to show that its appraisal methods produced the facility's true value. The company presented competent evidence in rebuttal, including testimony from an appraisal expert who calculated a much lower property value using three valuation approaches while factoring in the facility's functional obsolescence. The county's expert witness offered five sales as comparable to the facility's value but did not appraise the facility under a sales comparison approach, the county's appraisal under the cost approach did not factor in the facility's functional obsolescence, and the county did not demonstrate that the cost approach was the most appropriate valuation method.

Appeal by Yadkin County from the Final Decision of the North Carolina Property Tax Commission entered 21 November 2019 by Chairman Robert C. Hunter at the North Carolina Property Tax Commission. Heard in the Court of Appeals 26 January 2021.

J. Clark Fischer, *Attorney for Appellant Yadkin County.*

Collier R. Marsh, *Attorney for the Appellee.*

GORE, Judge.

¶ 1 Yadkin County ("the County") appeals from the final Decision of the North Carolina Property Tax Commission ("the Commission") reversing the County's 2017 *ad valorem* property tax valuation of Unifi Manufacturing, Inc.'s ("taxpayer") textile manufacturing facility.

I. Background

¶ 2 This case arises from the County's 2017 *ad valorem* tax assessment of the taxpayer's textile manufacturing facility. In disagreement with the

County's assessment, taxpayer filed a Notice of Appeal and Application for Hearing with the North Carolina Property Tax Commission. The Commission heard the appeal on its merits at a hearing on 1 October 2019.

¶ 3 The taxpayer's evidence before the Commission included the following. M. Scott Smith, an expert in real property appraisal, testified that he conducted the valuation of the property using three approaches to value (cost, sales comparison, and income) and reconciled all three approaches to arrive at his opinion of value of $16,060,000 (the same value as produced by the sales comparison approach) and that the net value of the property was $14.75 per square foot. Mr. Smith testified that the best use of the property would be continued industrial use and that the property suffered from significant obsolescence, in part because a substantial square footage of the property was a tower (the "F1 tower") custom built to house older technology that is no longer in use.

¶ 4 Douglas M. Faris, an expert in real estate brokerage, testified that in his opinion the subject property would be a challenge to resell because the property would be difficult to adapt to an alternate use; due to factors such as the F1 tower being "useless" in a different manufacturing operation and the property being much larger than most manufacturing operations require. Mr. Faris testified that the layout and other characteristics of the facility made it inappropriate for alternative uses, such as warehouse or office space. In Mr. Faris's opinion a valuation of $14-$15 per square foot would be appropriate.

¶ 5 Sohan Mangaldas, an expert in textile global markets, testified that there has been a decline in U.S. based production of the polyester yarn produced at the facility and that there would be "no demand to purchase" the subject property for the purpose of continuing its current operation.

¶ 6 The County's evidence included testimony from Ronald S. McCarthy, an expert in *ad valorem* appraisal of industrial property, who conducted the appraisal of taxpayer's property. Mr. McCarthy testified that, in his opinion, the cost approach and the sales comparison approach would be most appropriate for valuation of the subject property. Mr. McCarthy further testified that he only relied on the cost approach; he had not prepared a sales comparison approach or an income approach in developing his appraisal of the subject property. Mr. McCarthy's report listed various features for the property and discussed how each feature contributed to the County's total value of $27,450,241. To support its valuation the County offered five sales as comparable to the subject property; the average sales price for these properties was $31.04 per square foot.

Mr. Faris, one of the taxpayer's witnesses, testified that he was personally involved in each sale offered by the County, and that none of the properties was comparable to the subject property.

¶ 7 The Commission found that, of the three valuation approaches recognized in North Carolina, the income approach is the least relevant here because the subject property is not income-producing. Additionally, the Commission concluded the cost approach is more challenging to develop accurately, and thus, should only be used as a test of reasonableness for a value developed by one of the other methods. The Commission found that the sales comparison approach is the most likely to produce a true value for the subject property.

¶ 8 The Commission recognized that a county's *ad valorem* tax assessment is presumptively correct. However, the Commission found that the taxpayer rebutted the presumption by offering competent, material, and substantial evidence that the County used an illegal appraisal method, and that the County's assessment of the subject property substantially exceeded its true value. Further, the Commission found that the County was not able to demonstrate that its method in appraising the subject property produced true value because it did not sufficiently explain how any of the three approaches to value supported the County's tax value. As a result, the Commission ordered that the 2017 tax value of the subject property be changed to $16,060,000.

II. Discussion

¶ 9 The County challenges the Commission's Final Decision asserting that the Commission failed to properly apply the presumption of correctness and that the whole record does not support the conclusion that the County's assessment of the property was illegal. For the reasons discussed below, we disagree.

A. Standard of Review

¶ 10 On appeal a decision of the Property Tax Commission is reviewed under the "whole record" test. *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981). "The Court must decide all relevant questions of law *de novo*, and review the findings, conclusions and decision to determine if they are affected by error or are unsupported 'by competent, material and substantial evidence in view of the entire record.' " *In re Appeal of Parsons*, 123 N.C. App. 32, 38–39, 472 S.E.2d 182, 187 (1996) (quoting *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993)). "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to

determine whether an administrative decision has a rational basis in the evidence." *McElwee* at 87, 283 S.E.2d at 127 (quoting *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979)).

B. Presumption of Correctness

¶ 11 "*[A]d valorem* tax assessments are presumed to be correct." *In re AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). This presumption is rebuttable. *Id.* at 563, 215 S.E.2d at 762. To rebut the presumption the taxpayer "must produce 'competent, material and substantial' evidence tend[ing] to show that: (1) Either the county tax supervisor used an *[a]rbitrary method* of valuation; or (2) the county tax supervisor used an *[i]llegal method* of valuation; AND (3) the assessment *[s]ubstantially* exceeded the true value in money of the property." *Id.* (emphasis added) (internal citations omitted).

¶ 12 "A property valuation methodology is arbitrary and illegal if it fails to produce 'true value' as defined in N.C. Gen. Stat. § 105-283." *In re Matter of Appeal of Harris Teeter, LLC*, 271 N.C. App. 589, 600, 845 S.E.2d 131, 139 (2020) (citation omitted).

¶ 13 "Once the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values." *In re Parkdale Mills*, 225 N.C. App. 713, 717, 741 S.E.2d 416, 420 (2013).

¶ 14 Here, the County argues that the Commission erred because its "findings of fact are insufficient to support its conclusions of law that Yadkin County illegally valued the [property] in a manner that resulted in a substantially inflated value." This assertion is incorrect. The Commission found that the taxpayer "rebutted the presumption of correctness of the assessment of the subject property by the County when the [taxpayer] offered competent, material, and substantial evidence that the County used an illegal appraisal method, and that the County's assessment of the subject property substantially exceeded its true value." Once the taxpayer rebutted the presumption, the burden then shifted to the County to prove that its methods demonstrated the true value of the property. The Commission found that the County failed to demonstrate its methods produced the true value of the property.

¶ 15 The taxpayer presented evidence from three expert witnesses who provided evidence why the value of the property was lower than the County assessed. One of taxpayer's experts, Mr. Smith, conducted his own valuation of the property, using all three valuation methods accepted in North Carolina, to conclude that the value of the property was

in fact $16,060,000, or $11,390,241 lower than the County's valuation of $27,450,241. Further, Mr. Smith testified that the discrepancy between the County's and Mr. Smith's valuations was a result of his valuation considering the functional obsolescence of the property. This evidence mirrors that offered in *Harris Teeter*, where the taxpayer offered an expert appraiser's testimony of his own individual appraisal that resulted in an appraised value of the property which was $7,771,313 lower than the County's appraised value. 271 N.C. App. at 600, 845 S.E.2d at 140. The Court found that this evidence was sufficient to rebut the presumption that the County's appraisal methodology produced true value, even though the County presented expert testimony to support its valuation. *Id*. The taxpayer's evidence is similarly sufficient here.

C. Shifted Burden

¶ 16 Because the taxpayer rebutted the presumption of correctness of the County's valuation, the burden then shifted to the County to show its assessment produced the true value of the property. Once the burden has shifted, the critical inquiry is "whether the County's appraisal methodology 'is the proper means or methodology given the characteristics of the property under the appraisal to produce a true value or fair market value.' " *In re Parkdale Mills*, 225 N.C. App. at 717, 741 S.E.2d at 420 (citations omitted). The County did not accomplish this in this case. While the County offered sales information as a comparison to the current property, it did not develop a sales comparison approach to produce an appraised value. Therefore, the Commission could not determine whether the sales were comparable to the subject property. The County's reconstructed cost estimate of the subject property included virtually no acknowledgment of its obsolescence and provided no explanation for how that factor affected the validity of the cost approach. Further, the County did not offer evidence that the cost approach was more appropriate in valuing this property than one of the other approaches. In fact, the County's expert, Mr. McCarthy, testified that neither the cost approach or sales comparison approach would be appropriate. Therefore, the Commission was reasonable in concluding that the cost approach should not be used as a test of reasonableness and that the sales approach is the most likely to produce the true value of the property.

¶ 17 The County's limited evidence failed to satisfy its burden to show that its appraisal methodology was proper or produced the true value of the subject property.

III. Conclusion

¶ 18 For the foregoing reasons, we affirm the Commission's Final Decision.

AFFIRMED.

Chief Judge STROUD and Judge INMAN concur.

IN THE MATTER OF W.M.C.M.

No. COA20-164

Filed 20 April 2021

1. Juveniles—admissions—rights—inquiry by court—statutory requirements

In a delinquency case in which a juvenile admitted to committing two breaking and entering offenses, the trial court's colloquy with the juvenile adequately addressed the factors in N.C.G.S. § 7B-2407(a) regarding the juvenile's understanding of the charges against him and of the consequences of admitting to those charges, including that he was waiving his right to confront witnesses. The court was not required to use the statutory language verbatim.

2. Juveniles—delinquency—adjudication order—statutory requirements

The trial court's order adjudicating a juvenile delinquent after the juvenile admitted to committing two breaking and entering offenses contained all the requirements of N.C.G.S. § 7B-2411, including the date of the offenses, the felony classification of the offenses, and the date of adjudication, and the order included the statement that, based on the evidence and the juvenile's admission, the juvenile was delinquent beyond a reasonable doubt. Further, the trial court was not required by statute or case law to use a particular form for its order.

3. Juveniles—delinquency—request to remand to juvenile court—protection of rights

In a delinquency case in which a juvenile admitted to committing two breaking and entering offenses, the Court of Appeals rejected the juvenile's request to have his case remanded to the juvenile court. The trial court adequately protected the juvenile's rights

by addressing all the statutory factors in N.C.G.S. § 7B-2407(a) and the juvenile was fully informed of his rights before voluntarily entering a guilty plea.

4. Juveniles—delinquency—disposition order—sufficiency of findings—statutory factors

In a delinquency matter in which the juvenile admitted to committing two breaking and entering offenses, the trial court's disposition findings addressed each of the factors in N.C.G.S. § 7B-2501(c), including by stating that the juvenile's violent behavior and criminal charges had escalated and that the juvenile had fled multiple times from treatment facilities and court dates. The trial court did not abuse its discretion by determining that the juvenile should be committed to a youth development center.

Judge MURPHY dissenting.

Appeal by juvenile from order entered 1 April 2019 by Judge David Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for juvenile-appellant.

TYSON, Judge.

¶ 1 The juvenile ("Walter") appeals from an order, which imposed a Level 3 disposition and committed Walter to a youth development center ("YDC"). *See* N.C. R. App. P. 42(b)(4) (permitting the use of pseudonyms to protect the identity of the juvenile). We affirm.

I. Background

¶ 2 Walter was 15 years old at the time of this dispositional hearing. He was diagnosed with oppositional defiant disorder, conduct disorder, ADHD, cannabis use disorder, and tobacco-related disorder in August 2018.

¶ 3 Walter broke into a storage unit on 2 August 2018. In September 2018, Walter was placed into custody of the Mecklenburg County Department of Social Services ("DSS") after a court determined his mother was

unable to provide proper care and discipline over him. While in DSS custody, Walter broke into two vehicles on 1 October 2018.

¶ 4 DSS placed Walter into a group home in October 2018, from which he fled. He was located, taken into custody, and placed into secure custody in a juvenile detention facility.

¶ 5 Several additional criminal charges and probation violations were pending against Walter at the time he appeared with appointed counsel at the December 2018 adjudication hearing.

A. Adjudication

¶ 6 Petitions alleged Walter had committed two counts of breaking and entering into a motor vehicle, and one count of felony breaking and entering on 31 December 2018. As part of an agreement with the State, Walter entered an admission to the breaking and entering petition and one of the breaking and entering a motor vehicle petitions. The State agreed to dismiss several additional pending charges, voluntarily dismissed a motion for review based on a probation violation and declined to seek additional petitions for Walter's conduct and actions.

¶ 7 The court informed Walter of his constitutional and statutory rights. Based upon Walter's admissions, and after the State had provided a factual basis for the petitions, the court stated it was "going to adjudicate [Walter] delinquent as to the charge of felony breaking and entering and felony breaking and entering of a motor vehicle." The trial court recorded these findings and conclusions on the Arraignment Order.

B. Disposition

¶ 8 The dispositional hearing was calendared for 23 January 2019. Walter fled when he arrived at the courthouse. As a result of Walter's flight, the hearing was rescheduled for 29 January 2019. The juvenile court counselor recommended committing Walter to a YDC. After hearing arguments, the court took the matter under advisement and continued the case to February 2019.

¶ 9 The court held an emergency hearing at the request of DSS on 14 February 2019. An attorney for DSS reported an incident where Walter punched a concrete wall. DSS' attorney reported Walter was "very anxious" about the outcome of his case. A social worker for DSS noted that Walter had also been banging his head against a wall, was violent, and required restraint several times before the hearing. The court granted DSS' request for medication.

¶ 10 The case was heard again on 25 February 2019. The court again continued the case due to an "overwhelming amount of information" regarding Walter's actions and mental health.

¶ 11 At the dispositional hearing on 26 March 2019, the juvenile court counselor reported Walter had again fled from his placement. The State asked the court to commit Walter to a YDC. The court agreed and issued its Disposition and Commitment order detailing Walter's delinquency, history of criminal acts, and violent and aggressive behaviors on 1 April 2019. Walter timely appealed.

II. Jurisdiction

¶ 12 Appellate jurisdiction exists pursuant to N.C. Gen. Stat. §§ 7B-2602 and 7B-2604 (2019).

III. Issues

¶ 13 Walter argues the trial court (1) erred by adjudicating him delinquent and failing to tell him that, by entering an admission, he would waive his right to confrontation; (2) failed to enter a sufficient adjudication order; and, (3) abused its discretion by imposing the highest possible disposition.

IV. Standard of Review

¶ 14 An alleged violation of a statutory mandate is a question of law and is reviewed *de novo*. *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012).

V. Analysis

A. Adjudication Hearing

1. Statutory Requirements

¶ 15 **[1]** A trial court "may accept an admission from a juvenile only after determining that the admission is the product of an informed choice." N.C. Gen. Stat. § 7B-2407(b) (2019). To ensure an admission is informed, the trial court must first, before accepting an admission, address the juvenile personally and:

> (1) Inform[] the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determin[e] that the juvenile understands the nature of the charge;

> (3) Inform[] the juvenile that the juvenile has a right to deny the allegations;
>
> (4) Inform[] the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) Determin[e] that the juvenile is satisfied with the juvenile's representation; and
>
> (6) Inform[] the juvenile of the most restrictive disposition on the charge.

N.C. Gen. Stat. § 7B-2407(a) (2019). The trial court's failure to address these inquiries to the prejudice of the juvenile requires reversal of the adjudication. *In re A.W.*, 182 N.C. App. 159, 161, 641 S.E.2d 354, 356 (2007).

2. Walter's Delinquency Admissions

¶ 16 The following colloquy occurred between the trial court and Walter during the delinquency adjudication hearing:

> THE COURT: Do you understand that in the hearing you have the right to not say anything about your charge, or that any statement you make may be used as evidence against you?
>
> JUVENILE: Yes, sir.
>
> . . . .
>
> THE COURT: And have the terms been explained to you by your lawyer?
>
> JUVENILE: Yes, sir.
>
> THE COURT: And do you understand what the charges are?
>
> JUVENILE: Yes, sir.
>
> THE COURT: Do you understand every part of each charge?
>
> JUVENILE: Yes, sir.
>
> THE COURT: Have you and your lawyer discussed the possible reasons why you would not be responsible for the charge?

JUVENILE: Yes, sir.

THE COURT: And how -- are you satisfied with [your counsel's] help in your case?

JUVENILE: Yes, sir.

THE COURT: You understand that you have the right to deny the charges?

JUVENILE: Yes, sir.

THE COURT: You understand that you have the right to have this case heard before a judge in juvenile court?

JUVENILE: Yes, sir.

THE COURT: *You also understand you have the right to ask witnesses questions during a hearing?* [Emphasis supplied].

JUVENILE: Yes, sir.

THE COURT: Do you understand that you're admitting to the following charges: Felony breaking and entering, which is a Class H felony with a date of offense of August the 2nd, 2018; and felony breaking and entering of a motor vehicle, a Class I felony, with the date of offense of October the 1st, 2018?

JUVENILE: Yes, sir.

THE COURT: Do you understand the most serious disposition, given your history, is as follows: A Level 3 disposition, which could be the commitment to the Juvenile Justice Section of the Division of Adult Corrections and Juvenile Justice for placement in the Youth Development Center for a minimum of six months and an absolute maximum until your 18th birthday?

JUVENILE: Yes, sir.

THE COURT: Do you now personally admit the charges?

JUVENILE: Yes, sir.

> THE COURT: Did you in fact commit the acts charged in the petition? Did you do it?
>
> JUVENILE: Yes, sir.

¶ 17 Walter concedes the court provided all but the fourth warning set forth in the statute. N.C. Gen. Stat. § 7B-2407(a)(4) ("[i]nforming the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile").

¶ 18 Walter acknowledges the court told him he had the right to "ask witnesses questions during a hearing." However, Walter asserts the trial court erred by failing to specifically tell him he would waive the right to confront witnesses by entering an admission.

¶ 19 Walter relies on the case of *In re A.W.*, 182 N.C. App. at 161-62, 641 S.E.2d at 356-57. In that case, this Court recognized the trial court had "failed to strictly comply with N.C. Gen. Stat. § 7B–2407." *Id.* This Court reversed where the trial court failed to orally inform the juvenile of his rights under the first and third prongs of the statute. *Id.* This Court held "increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt. At a very minimum, this requires asking a juvenile each of the six specifically mandated questions listed in N.C.G.S. § 7B–2407(a)." *Id.* at 162, 64 S.E.2d at 356. (emphasis omitted) (citations omitted).

¶ 20 Walter argues his adjudication must be reversed because the trial court did not follow the exact language of N.C. Gen. Stat. § 7B-2407. This Court dealt with a similar issue in the case of *In re C.L.*, 217 N.C. App. 109, 719 S.E.2d 132 (2011).

¶ 21 The issue before and reviewed by this Court in *C.L.* was "whether the trial court's failure to make the inquiry specified in N.C. Gen. Stat. § 15A–1022(d) either affected [the] Juvenile's decision to plead or undermined the plea's validity." *Id.* at 115, 719 S.E.2d at 136 (alterations and citations omitted). In *C.L.*, the trial court questioned the juvenile before his admission using the colloquy from Form AOC-J-410, entitled "Transcript of Admission by Juvenile." *Id.* at 110, 719 S.E.2d at 133. On appeal, the juvenile asserted "the trial court erred by failing to determine whether his *Alford* admission represented his free and informed choice." *Id.* at 113, 719 S.E.2d at 134.

¶ 22 This Court held that while the trial court did not strictly comply with N.C. Gen. Stat. § 15A–1022(d), the juvenile "had been informed of the consequences of his [] admission and fully understood that he would be

treated as subject to the trial court's dispositional authority after entering his admission." *Id.* at 115, 719 S.E.2d at 136.

> [T]he record developed in the trial court indicates that Juvenile was adequately apprised of the consequences of making his *Alford* admission, understood what would happen if he persisted in making such an admission, and made an "informed choice" to admit responsibility pursuant to *Alford* instead of asserting the rights that would have been available to him had he gone to hearing.

Id. at 116, 719 S.E.2d at 136. (citations omitted).

¶ 23 The facts before us are similar to those in *In re C.L.* Prior to the State offering factual support of the charges, the trial court asked Walter the questions listed on Form AOC-J-410 nearly *verbatim*:

> THE COURT: Sir, do you make this admission of your own free will, fully understanding what you are doing?
>
> JUVENILE: Yes, sir.
>
> THE COURT: And do you have any questions about what has just been said to you or anything else connected with your case?
>
> JUVENILE: No, sir.

¶ 24 The trial court also gave a broader explanation to Walter of his confrontation rights than the exact statutory language. The statute does not require the exact statutory language to be used during the colloquy, but rather requires the court to orally and clearly inform the juvenile of his rights, which Walter affirmatively answered. *See* N.C. Gen. Stat. § 7B-2407.

¶ 25 We hold Walter "understood that he could deny the allegations and have a hearing and that, by admitting responsibility, he was foregoing that right." *In re C.L.* 217 N.C. App. at 116, 719 S.E.2d at 136.

¶ 26 The trial court relied upon the provided Form AOC-J-410 "Transcript of Admission by Juvenile G.S. 7B-2407." To reverse Walter's admission on these facts would require this Court to find the officially adopted AOC "Transcript of Admission" form is an insufficient guide for the trial courts to use and it fails to comply with the statute. Walter has failed to

show any error, prejudice, or that his confrontation right, or any of his other rights were violated. His arguments are overruled.

3. Non-persuasive Authority

¶ 27 Walter argues the trial court failed to enter a sufficient written adjudication order. Walter relies on an unpublished and nonbinding opinion, *In re O.S.R.*, 255 N.C. App. 448, 803 S.E.2d 706, 2017 WL 3864011, *1 (2017). In this case, this Court remanded the trial court's adjudication of delinquency order wherein the trial court had failed to check box number 3 on the form adjudication order. This Court remanded the order for the trial court to correct the written order to conform with its oral findings. *Id.* at * 2. The nonbinding conclusion in the opinion of *In re O.S.R.* does not impose a requirement for factual findings in adjudication orders. We dismiss Walter's arguments concerning *In re O.S.R.*

4. N.C. Gen. Stat. § 7B-2411

¶ 28 **[2]** Walter also contends the trial court's order was insufficient because the trial court did not use an AOC form Adjudication Order. Instead, the trial court used an Arraignment Order and the Transcript of Admission by Juvenile Form. No statute or case requires this exact form to be used. *See* N.C. Gen. Stat. § 7B-2411 (2019); *see also In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011). We overrule Walter's objection to the forms used by the trial court.

¶ 29 Further, Walter argues the trial court's order did not comply with N.C. Gen. Stat. § 7B-2411 because it did not specifically state that the allegations in the petition had been proven beyond a reasonable doubt. An alleged violation of a statutory mandate is a question of law and reviewed *de novo*. *In re A.M.*, 220 N.C. App. at 137, 724 S.E.2d at 653.

¶ 30 If the allegations in the petition have been proven beyond a reasonable doubt, "the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication." N.C. Gen. Stat. § 7B-2411.

¶ 31 In the case of *In re J.V.J.*, this Court held the trial court's findings were insufficient to support the adjudication of delinquency where the court "fail[ed] to include the requisite findings in its adjudication order" and "[r]ather than addressing the allegations in the petition in the blank area the court . . . indicate[d], through a fragmentary collection of words and numbers, that an offense occurred and [] state[d] that Joseph was 'responsible.' " *In re J.V.J.*, 209 N.C. App. at 740-41, 707 S.E.2d at 638.

¶ 32 This Court specifically held N.C. Gen. Stat. § 7B-2411 "does not require the [trial] court to delineate each element of an offense and state in writing the evidence which satisfies each element." *Id.* The Court further recognized: "section 7B–2411 does not specifically require that an adjudication order contain appropriate findings of fact . . . . Nevertheless, at a minimum, section 7B–2411 requires a court to state in a written order that the allegations in the petition have been proved [beyond a reasonable doubt]." *Id.* at 740, 707 S.E.2d at 638 (internal citations and quotation marks omitted).

¶ 33 In a later case, *In re K.C.*, 226 N.C. App. 452, 460-61, 742 S.E.2d 239, 245 (2013), this Court held the trial court's order satisfied the minimal requirements of N.C. Gen. Stat. § 7B–2411. The order provided the date of the offense, that the assault charge was a class 2 misdemeanor, the date of the adjudication, and stated the court had "considered the evidence and adjudicated [the juvenile] delinquent as to the petition's allegation of simple assault beyond a reasonable doubt." *Id.*

¶ 34 Here, after Walter's knowing and affirmative admissions of responsibility to the plea agreement offered by the State, the court made its finding after the prosecutor had provided the factual support and basis for the charges. The court wrote: "BASED UPON THE JUVENILE'S ADMISSION AND THE EVIDENCE PRESENTED BY THE DA, THE COURT FINDS BEYOND A REASONABLE DOUBT THAT THE JUVENILE[] IS ADJUDICATED DELINQUENT."

¶ 35 Here, as in preceding cases, the trial court's adjudication order of delinquency met and contained all requirements of N.C. Gen. Stat. § 7B-2411. The order was written, indicated the date of the offenses, the felony classification of the offenses, and the date of adjudication. The trial court's order contained factual findings including the juvenile's affirmative admission of responsibility to the charges of felony breaking and entering and felony breaking and entering of a motor vehicle. In exchange, the State agreed to dismiss multiple other charges and probation violation and not to seek a future petition on his other culpable conduct and actions. The court's order clearly satisfies the statutory requirements. The juvenile's arguments are without merit and dismissed.

5. Protection of Juvenile

¶ 36 **[3]** Finally, Walter argues his case should be remanded to the juvenile court because our court system has a greater duty to protect the rights of juveniles. "Our courts have consistently recognized that the State has a greater duty to protect the rights of a respondent in a juvenile proceed-

ing than in a criminal prosecution." *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) (emphasis omitted) (citations omitted).

¶ 37 The trial court not only addressed all six prongs in the statute, but broke down the language for the juvenile to better comprehend and respond affirmatively to the questions. Walter was fully informed of the rights he was waiving, and after being clearly informed of his rights, he expressly agreed to take the State's plea offer and admit responsibility for his actions. Walter signed the Form AOC-J-410 agreement after the trial court had explained his rights to him and while represented by counsel. The record affirmatively shows on its face Walter's plea was knowingly and voluntarily entered. *In re Chavis*, 31 N.C. App. at 580–81, 230 S.E.2d at 199–200.

B. Dispositional Order

1. Standard of Review

¶ 38 "The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason." *In re K.L.D.*, 210 N.C. App. 747, 749, 709 S.E.2d 409, 411 (2011) (citing *In re N.B.*, 167 N.C. App. 305, 605 S.E.2d 488 (2004)). Dispositional orders are reviewed on appeal for abuse of discretion. *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002).

2. N.C. Gen. Stat. § 7B-2501(c) Findings

¶ 39 **[4]** Walter asserts the trial court abused its discretion by failing to properly consider each factor listed in N.C. Gen. Stat. § 7B-2501(c). After a juvenile has been adjudicated delinquent, the trial court is required to choose a disposition within the guidelines of N.C. Gen. Stat. § 7B-2508 (2019). The trial court's decision must include the factors contained in N.C. Gen. Stat. § 7B-2501(c).

> [T]he court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;

> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2019).

¶ 40 The "trial court must consider each of the five factors in crafting an appropriate disposition." *In re I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018). "The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition . . . to allow a reviewing court to determine . . . whether the judgment and the legal conclusions which underlie it represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

¶ 41 Walter argues the trial court did not make the required findings of facts. We disagree. The trial court provided a thorough writing of its findings at the conclusion of the disposition hearing. Addressing N.C. Gen. Stat. § 7B-2501(c)(1) the seriousness of the offense; and § 7B-2501(c)(3) the importance of protecting the public safety, the trial court found: "The Juvenile admitted to two unrelated offenses of Felony Breaking and Entering and Breaking and Entering a Motor Vehicle. This court notes the Juvenile's ongoing criminal activity has escalated from misdemeanor offenses to felonies."

¶ 42 The court noted the seriousness of the offense by checking box nine of the disposition order indicating, "[t]he juvenile has been adjudicated for a violent or serious offense and Level 3 is authorized by G.S. 7B-2508." The trial court further illustrated the importance of protecting public safety by referencing Walter's increasingly aggressive and assaultive behaviors toward himself and others.

¶ 43 Addressing § 7B-2501(c)(2), the need to hold the juvenile accountable, the court found: "The court made several attempts to work with the Juvenile and get appropriate services in place." The court noted Walter had several offenses pending, his criminal activity was ongoing and escalating, and his aggressive and assaultive behaviors and language. Further, the trial court addressed the need for accountability by highlighting Walter's violent behaviors and flight which had consistently occurred and increased despite DSS' ineffective interventions and placements.

¶ 44 Addressing § 7B-2501(c)(4), the degree of culpability indicated by the circumstances of the particular case, the trial court found: "this court continued disposition for an additional three months to give the Juvenile an opportunity to comply." Further, "the Juvenile displayed aggressive and assaultive behavior and inappropriate language." Finally, the trial court found, "this Juvenile has had numerous evaluations" and noted Walter's admissions to the charges, multiple offenses, and the escalating nature of his criminal offenses to felonies.

¶ 45 Finally, addressing § 7B-2501(c)(5), the rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment, the trial court considered the degree of culpability and flight by specifically listing Walter's admissions, the multiple occasions he went AWOL and fled from his treatment facilities, placements and court dates. Finally, the court stated: "Over the last month, the Juvenile's behavior has improved and there has been some progress at New Hope" noting its belief the treatment would be helpful to Walter.

¶ 46 Throughout the course of the trial court's history with Walter, it had considered and implemented multiple treatment options and lesser restraints. The trial court relied upon twelve (12) reports from organizations which had been working with Walter during the preceding years. The trial court then provided detailed findings of fact leading to its conclusion that Walter's best interest and the safety of the public would be served by his commitment to the YDC. After all of these considerations the trial court, in its discretion, found and concluded:

> Due to the escalating nature of the Juvenile's charges and the lack of treatment due to inappropriate placement options and the Juvenile's AWOL behaviors, this Court Orders that the Juvenile be committed to the Youth Development Center.

¶ 47 After reviewing the overwhelming evidence contained in the trial court's written findings, the dispositional order contains appropriate findings of fact which illustrate the failures of the less restrictive placements and methods, and Walter's need for commitment. No abuse of discretion is shown. The order of the trial court is affirmed.

VI. Conclusion

¶ 48 The trial court clearly informed Walter of his right to confrontation by following the "Transcript of Admission" form almost *verbatim*. The trial court properly followed Form AOC-J-410 during Walter's admissions. The court met the statutory requirements to include date of the

offenses, the felony charges, and date of the adjudication, and the supporting findings beyond a reasonable doubt.

¶ 49 Finally, the trial court provided written findings of fact based upon Walter's extensive criminal history and his violent and recalcitrant behaviors to support its conclusion of delinquency of the juvenile and disposition to commit to YDC. The juvenile has failed to show any prejudicial errors in the trial court's procedures, orders, dispositions, or commitment. The order is affirmed. *It is so ordered.*

AFFIRMED.

Judge GORE concurs.

Judge MURPHY dissents with separate opinion.

MURPHY, Judge, dissenting.

¶ 50 The Majority concludes the trial court properly adjudicated Walter delinquent. *Supra* at ¶¶ 26, 35. Based upon binding precedent, I respectfully dissent for two reasons: (A) the trial court's colloquy with Walter during the adjudication hearing was inadequate; and (B) the trial court's adjudication order was insufficient.

ANALYSIS

A. Sufficiency of the Colloquy–N.C.G.S. § 7B-2407

¶ 51 The Majority determines the colloquy between the trial court and Walter met the requirements of N.C.G.S. § 7B-2407(a) and rests its analysis on *In re A.W.* and *In re C.L. Supra* at ¶¶ 24-26. N.C.G.S. § 7B-2407(a) states:

> (a) The court may accept an admission from a juvenile *only after* first addressing the juvenile personally and:
>
> (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determining that the juvenile understands the nature of the charge;
>
> (3) Informing the juvenile that the juvenile has a right to deny the allegations;

> (4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) Determining that the juvenile is satisfied with the juvenile's representation; and
>
> (6) Informing the juvenile of the most restrictive disposition on the charge.

N.C.G.S. § 7B-2407(a) (2019) (emphasis added). A trial court must "strictly comply with [N.C.G.S. § 7B-2407]" "[by, at] '*a very minimum*, . . . *asking a juvenile each of the six specifically mandated questions* listed in N.C.G.S. § 7B-2407(a).' " *In re A.W.*, 182 N.C. App. 159, 161-62, 641 S.E.2d 354, 356 (2007) (quoting *In re T.E.F.*, 359 N.C. 570, 576, 614 S.E.2d 296, 299 (2005)).

¶ 52 The Majority acknowledges the strict compliance to N.C.G.S. § 7B-2407(a) required by *In re T.E.F.* and *In re A.W.* to adjudicate a juvenile delinquent when the juvenile admits guilt, but then applies a much more lenient and inapplicable approach from *In re C.L.* to the present case. *Supra* at ¶¶ 19-26. According to the Majority's approach, "[N.C.G.S. § 7B-2407(a)] does not require the exact statutory language to be used during the colloquy, but rather requires the court to orally and clearly inform the juvenile of his rights[.]" *Supra* at ¶ 24. To bolster this assertion, the Majority inappropriately applies *In re C.L.* to the present matter, where we held a trial court is required to "adequately apprise[] [a juvenile] of the consequences of making [the] admission" so the juvenile can make an " 'informed choice' to admit responsibility[.]" *In re C.L.*, 217 N.C. App. 109, 116, 719 S.E.2d 132, 136 (2011).

¶ 53 Contrary to the Majority's interpretation, *In re C.L.* is inapplicable to this matter because N.C.G.S. § 7B-2407(a) was not at issue in that case. In *In re C.L.*, we stated:

> Although this Court has adopted a totality of the circumstances test for use in evaluating the voluntariness of guilty pleas tendered by adult defendants, this Court and the Supreme Court have declined to require the use of such an analysis for purposes of evaluating the sufficiency of a trial court's compliance with [N.C.G.S.] § 7B-2407. However, *while the strict compliance approach delineated by this Court and the Supreme Court*

> *. . . rested on the statutory language of [N.C.G.S.] § 7B-2407, [the juvenile's] argument in this case rests upon [N.C.G.S.] § 7B-2405(6) and [N.C.G.S.] § 15A-1022(d) rather than any sort of alleged noncompliance with [N.C.G.S.] § 7B-2407. For that reason*, the extent to which [the juvenile] is entitled to relief from the trial court's adjudication order *hinges upon* the proper application of *the totality of the circumstances test* . . . . Thus, the ultimate issue before us in connection with [the juvenile's] challenge to the acceptance of his admission of responsibility is whether the trial court's failure to make the inquiry specified in [N.C.G.S.] § 15A-1022(d) either affected [the juvenile's] decision to plead or undermined the plea's validity.

Id. at 115, 719 S.E.2d at 135-36 (emphasis added) (internal citations and marks omitted). While we applied a totality of the circumstances approach in reviewing the colloquy at issue in *In re C.L.*, we were not reviewing for the trial court's alleged noncompliance with N.C.G.S. § 7B-2407(a), but rather N.C.G.S. § 7B-2405(6) and N.C.G.S. § 15A-1022(d). Here, Walter specifically argues his colloquy did not follow the requirements of N.C.G.S. § 7B-2407(a). The Majority's reliance on *In re C.L.* to reduce strict compliance with N.C.G.S. § 7B-2407(a) under *In re T.E.F.* and *In re A.W.* is beyond our authority.

¶ 54 Instead, the requirement of strict compliance with N.C.G.S. § 7B-2407(a) from *In re T.E.F.* and *In re A.W.* still applies to colloquies in a juvenile delinquency determination when the juvenile admits guilt. *In re T.E.F.*, 359 N.C. at 576, 614 S.E.2d at 299; *In re A.W.*, 182 N.C. App. at 161-62, 641 S.E.2d at 356. In accordance with *In re T.E.F.*, a trial court must "specifically question" the juvenile by "asking . . . each of the six specifically mandated questions listed in N.C.G.S. § 7B-2407(a)." *In re T.E.F.*, 359 N.C. at 575-76, 614 S.E.2d at 299. Our Supreme Court referred to the "six specific steps" in N.C.G.S. § 7B-2407(a) not only as "paramount" and "necessary," but also as "mandatory language" when a trial court accepts "a juvenile's admission as to guilt during an adjudicatory hearing[,]" and are not "mere suggestions or a general guide for our trial courts[.]" *Id.* at 574-75, 614 S.E.2d at 298-99. Our Supreme Court "recognized . . . the State has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution[,]" and those "juvenile rights would certainly be undermined by ignoring

the mandatory language of N.C.G.S. § 7B-2407[.]" *Id.* at 575, 614 S.E.2d at 299 (internal citations and marks omitted).[1]

¶ 55 Here, the trial court did not comply with the requirements of N.C.G.S. § 7B-2407(a)(4); specifically, the trial court did not ask Walter whether he understood that by his "admissions [he] waive[d] [his] right to be *confronted by* the witnesses against [him.]" N.C.G.S. § 7B-2407(a)(4) (2019) (emphasis added). Instead, the trial court asked Walter whether he understood he had "the right to ask witnesses questions during a hearing[.]" This is not what *In re T.E.F.* requires.

¶ 56 The trial court deviated from the language of N.C.G.S. § 7B-2407(a)(4) in an apparent attempt to explain Walter's rights, but, in doing so, the trial court did not specifically state Walter had a right to be confronted by witnesses against him. The right to confront the witnesses against oneself is a greater right than to ask questions of the witnesses the State chooses to call. In *Coy v. Iowa*, the United States Supreme Court discussed the Confrontation Clause, observing:

> The Sixth Amendment gives a criminal defendant the right "to be confronted with the witnesses against him." This language "comes to us on faded parchment," *California v. Green*, 399 U.S. 149, 174, 90 S.Ct. 1930, 1943, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384–387 (1959).

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1. In applying a totality of the circumstances approach, the Majority applies the approach suggested by Judge Levinson's dissenting opinion when that matter was before this Court, an approach rejected by us and our Supreme Court. *In re T.E.F.*, 167 N.C. App. 1, 11-14, 604 S.E.2d 348, 354-56 (2004) (Levinson, J., dissenting), *aff'd*, *In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296.

Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, [*see*], *e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), or restrictions on the scope of cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). *Cf. Delaware v. Fensterer*, 474 U.S. 15, 18–19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*) (noting these two categories and finding neither applicable). The reason for that is not, as the State suggests, that these elements are the essence of the Clause's protection—but rather, quite to the contrary, that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, as Justice Harlan put it, "[s]imply as a matter of English" it confers at least "a right to meet face to face all those who appear and give evidence at trial." *California v. Green*, *supra*, at 175, 90 S.Ct., at 1943–1944. Simply as a matter of Latin as well, since the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead). Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak[. . .]." Richard II, Act 1, sc. 1.

We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. [*See*] *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–750, 107 S.Ct. 2658, 2668, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting). For example, in *Kirby v. United States*, 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899), which concerned the admissibility of prior convictions of codefendants to prove an element of the offense of receiving stolen Government property, we described the operation of

the Clause as follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused [. . .] except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." Similarly, in *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *California v. Green*, *supra*, at 157, 90 S.Ct., at 1934–1935. Last Term, the plurality opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987), stated that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."

The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). What was true of old is no less true in modern times. President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to "[m]eet anyone

face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry [. . .]. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow." Press release of remarks given to the B'nai B'rith Anti-Defamation League, November 23, 1953, quoted in Pollitt, *supra*, at 381. The phrase still persists, "Look me in the eye and say that." Given these human feelings of what is necessary for fairness,[] the right of confrontation "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. Chafee, The Blessings of Liberty 35 (1956), quoted in *Jay v. Boyd*, 351 U.S. 345, 375–376, 76 S.Ct. 919, 935–936, 100 L.Ed. 1242 (1956) (Douglas, J., dissenting). It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss–the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." *Kentucky v. Stincer*, *supra*, 482 U.S., at 736, 107 S.Ct., at 2662. The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential

> "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Coy v. Iowa, 487 U.S. 1012, 1015-20, 101 L. Ed. 2d 857, 863-66 (1988) (footnote omitted).

¶ 57 Similar to the trial court's failure to ask the juvenile whether he "was satisfied with his legal representation" in *In re T.E.F.*, as well as the trial court's failure to inform the juvenile "of his right to remain silent and the risk that any statements may be used against him . . . or of his right to deny the allegations" in *In re A.W.*, the trial court here did not ask Walter whether he understood his admission of guilt waived his right to be confronted by the witnesses against him. N.C.G.S. § 7B-2407(a)(4) (2019); *In re T.E.F.*, 359 N.C. at 575, 614 S.E.2d at 299; *In re A.W.*, 182 N.C. App. at 161, 641 S.E.2d at 356.

¶ 58 We must follow our Supreme Court's precedent in *In re T.E.F.*, as well as our application of that precedent in *In re A.W.* The Record in this case is clear that the juvenile suffered no prejudice in the acceptance of the plea offer from the State and is likely to suffer a more detrimental result from the setting aside of his agreement with the State. However, we cannot forego this precedent and create a totality of the circumstances approach to N.C.G.S. § 7B-2407(a) colloquies in a juvenile delinquency determination when the juvenile admits guilt. Even though the trial court complied with the standard form AOC-J-410 Transcript of Admission by Juvenile as recommended in dicta from our Supreme Court in *In re T.E.F.*, I would reluctantly reverse the trial court's orders and remand for further proceedings. *In re T.E.F.*, at 576, 614 S.E.2d 296, 299 (2005) ("We note that the Administrative Office of the Courts has available a standard form incorporating these statutory areas of inquiry.").

B. Sufficiency of the Written Adjudication Order–N.C.G.S. § 7B-2411

¶ 59 The Majority also determines the trial court's adjudication order complied with N.C.G.S. § 7B-2411 and cites *In re K.C.* and *In re J.V.J.* to support its conclusion. *Supra* at ¶ 35. However, neither case supports the Majority's conclusion "the trial court's adjudication order of delinquency met and contained all of the requirements of [N.C.G.S. § 7B-2411]." *Supra* at ¶ 35.

¶ 60 In accordance with N.C.G.S. § 7B-2411,

> [i]f the [trial] court finds that the *allegations in the petition* have been proved as provided in [N.C.G.S. §] 7B-2409, the [trial] court *shall so state* in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication. If the [trial] court finds that the allegations have not been proved, the [trial] court shall dismiss the petition with prejudice and the juvenile shall be released from secure or nonsecure custody if the juvenile is in custody.

N.C.G.S. § 7B-2411 (2019) (emphasis added); *see* N.C.G.S. § 7B-2409 (2019) ("The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging undisciplined behavior shall be proved by clear and convincing evidence."). The plain language of the statute requires a trial court's order adjudicating a juvenile delinquent to at least find the *allegations* in the petition have been proved beyond a reasonable doubt. *Id.* That is not what happened here, where the trial court merely found "beyond a reasonable doubt that the juvenile[] is adjudicated delinquent."

¶ 61 In *In re K.C.*, we held that when the trial court's written adjudication order "*clearly states* that the [trial] court considered the evidence and adjudicated [the juvenile] delinquent *as to the petition's allegation of simple assault* beyond a reasonable doubt[,] . . . the [trial] court's adjudication order satisfies [N.C.G.S. §] 7B-2411[.]" *In re K.C.*, 226 N.C. App. 452, 461, 742 S.E.2d 239, 245 (2013) (emphasis added). Specifically, the trial court's order in *In re K.C.* stated "the [trial] court finds beyond a reasonable doubt that the juvenile committed the offense of Sexual Battery and Simple Assault and he is ADJUDICATED DELINQUENT." *Id.* at 460, 742 S.E.2d at 245. Unlike *In re J.V.J.*, where the order lacked a finding the allegations were proved beyond a reasonable doubt, the trial court's order in *In re K.C.* contained a finding the allegation "of Sexual Battery and Simple Assault" had "been proven beyond a reasonable doubt[,]" and we affirmed "its simple assault adjudication as supported by sufficient findings of fact." *Id.* at 460-61, 742 S.E.2d at 245.

¶ 62 In *In re J.V.J.*, we noted "*at a minimum*, [N.C.G.S. §] 7B-2411 requires a [trial] court to state in a written order that the *allegations* in the petition have been proved beyond a reasonable doubt." *In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (emphasis added) (inter-

nal marks omitted). We held the adjudication order failed to include the requisite findings when it

> fail[ed] to address any of [the allegations in the petition] as required by [N.C.G.S. §] 7B-2411. Indeed, the adjudication order does not even summarily aver that the allegations in the petition have been proved. . . . [The] findings insufficiently address[ed] the allegations in the petition[,] . . . [and] we remand[ed] [the] case to the trial court to make the statutorily mandated findings[.]

Id. at 740-41, 707 S.E.2d at 638 (internal marks omitted).

¶ 63 Here, the trial court's order only stated it had considered the admission and evidence and found "beyond a reasonable doubt that the juvenile[] is adjudicated delinquent." While the charges were listed below the quote, there was no mention that the *allegation* was proved beyond a reasonable doubt, as N.C.G.S. § 7B-2411 requires. *In re J.V.J.* and *In re K.C.* do not change, but rather apply that statutory requirement. Additionally, neither *In re K.C.* nor *In re J.V.J.* declares a trial court's order is sufficient for including a finding that the adjudication, and not the allegation, was proved beyond a reasonable doubt. The trial court's order did not include any finding resembling the finding in the trial court's order in *In re K.C.* that the allegation was proved beyond a reasonable doubt. Rather, similar to the order at issue in *In re J.V.J.*, here "the adjudication order does not even summarily aver that the allegations in the petition have been proved[,]" and we should "remand this case to the trial court to make the statutorily mandated findings[.]" *In re J.V.J.*, 209 N.C. App. at 740-41, 707 S.E.2d at 638 (internal marks omitted).

CONCLUSION

¶ 64 In light of the insufficiency of the colloquy under N.C.G.S. § 7B-2407(a) and the insufficiency of the trial court's adjudication order under N.C.G.S. § 7B-2411, I would reverse the trial court's orders and remand for further proceedings. In light of the inadequacy of these aspects of the adjudicatory stage of the proceedings appealed here, I do not analyze whether the trial court abused its discretion in its choice of a disposition under N.C.G.S. § 7B-2501(c). I respectfully dissent.

STATE v. CARVER

[277 N.C. App. 89, 2021-NCCOA-141]

STATE OF NORTH CAROLINA
v.
MARK BRADLEY CARVER

No. COA19-1055

Filed 20 April 2021

Appeal and Error—appellate jurisdiction—grant of new trial—two grounds—appeal by State dismissed

Where the trial court granted a new trial to a criminal defendant on two separate grounds—ineffective assistance of counsel (IAC) and newly discovered evidence—the State's appeal, brought by filing notice of appeal and not through a petition for writ of certiorari, was dismissed. Since the State had no right to appeal the IAC ground pursuant to N.C.G.S. § 15A-1445(a)(2), it failed to invoke appellate jurisdiction for review of that issue, and because the two grounds were mutually exclusive and not inextricably intertwined, the State's appeal of the other ground was dismissed as moot.

Appeal by the State from order entered 12 June 2019 by Judge Christopher W. Bragg in Gaston County Superior Court. Heard in the Court of Appeals 13 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

North Carolina Center on Actual Innocence, by Christine C. Mumma and Guy J. Loranger, for defendant.

DIETZ, Judge.

¶ 1 Ordinarily, when a trial court allows a motion for appropriate relief and grants a criminal defendant a new trial, the State has no right to appeal. Instead, our General Statutes permit the State to ask for discretionary appellate review through a petition for a writ of certiorari.

¶ 2 But there is one exception. When a trial court allows an MAR and orders a new trial on the ground of newly discovered evidence, the State has a right to appeal "but only on questions of law." N.C. Gen. Stat. § 15A-1445(a)(2).

¶ 3 In this criminal case, the trial court granted an MAR and ordered a new trial on *two* grounds: ineffective assistance of counsel and newly

discovered evidence. The State concedes that these are mutually exclusive—grounds for a new trial based on newly discovered evidence cannot also be grounds for a claim of ineffective assistance because, if the evidence was available to counsel through the exercise of due diligence, then the evidence cannot be considered "newly discovered" as a matter of law.

¶ 4 The State appealed the trial court's grant of a new trial on these two grounds through a notice of appeal. The State did not petition for a writ of certiorari, even after the defendant moved to dismiss on the basis of Section 15A-1445(a)(2).

¶ 5 As explained below, we are constrained by precedent to dismiss this appeal. Under this Court's precedent, in an appeal of right based on Section 15A-1445(a)(2), we can review issues beyond the newly discovered evidence only if those issues are intertwined with the newly discovered evidence issue. Here, it is the opposite. The ineffective assistance claim is not, and cannot be, intertwined and is based on entirely separate facts and reasoning. Because the State has no right to appeal the ruling on the ineffective assistance claim, and because the State did not petition for a writ of certiorari, we dismiss the appeal on the ineffective assistance claim for lack of appellate jurisdiction and, as a result, dismiss the appeal on the newly discovered evidence claim as moot.

Facts and Procedural History

¶ 6 During the spring of 2008, Irina Yarmolenko was a student at UNC Charlotte, where she worked as a photographer for the school paper. In the last week of April 2008, she spoke with her editor about photographing the Olympic trials being held at the U.S. National Whitewater Center in Charlotte. Around 12:30 p.m. on 5 May 2008, two jet skiers on the Catawba river saw a blue car on the embankment near the water. They found Yarmolenko's body beside the car with a rope around her neck, across the river from the Whitewater Center. The State theorized that someone had strangled Yarmolenko and pushed her car down the bank.

¶ 7 Investigators attempted to lift fingerprints from the car but none of them had sufficient detail to allow for comparison. On the car, investigators found what is known as "touch DNA" from skin cells. The State alleged that the predominant profile of a swabbing taken from the recovered DNA above the driver's side rear door matched Defendant Mark Carver's DNA profile. The State also alleged that the predominant profile of swabbings taken from the interior front passenger door glass and arm rest matched the DNA profile of Carver's cousin, Neal Cassada. Carver repeatedly denied that he saw or touched Yarmolenko or her car.

¶ 8 On 12 December 2008, the Mount Holly Police Department arrested Carver and Cassada. A grand jury indicted both men for first degree murder and conspiracy to commit first degree murder. Cassada died of a heart attack before his 2010 trial date.

¶ 9 At Carver's trial, the State's evidence showed that Carver and Cassada had been fishing near the area where Irina Yarmolenko's body was found. The State relied on other circumstantial evidence including the DNA evidence to prove its case. Carver presented no evidence at trial.

¶ 10 The jury found Carver guilty of first degree murder. He received a mandatory life sentence. A divided panel of this Court upheld Carver's conviction and the Supreme Court affirmed that decision. *State v. Carver*, 221 N.C. App. 120, 725 S.E.2d 902 (2012), *aff'd per curiam*, 366 N.C. 372, 736 S.E.2d 172 (2013).

¶ 11 Several years later, Carver moved for appropriate relief and asserted actual innocence. Carver argued that he received ineffective assistance of counsel at his trial and that there was newly discovered evidence based on advances in DNA analysis. He also asserted that the State wrongly withheld incriminating information about another suspect.

¶ 12 In 2017, the trial court ordered an evidentiary hearing on Carver's motion for appropriate relief. The hearing took place in 2019. Carver and the State presented a combined 25 witnesses.

¶ 13 The evidence at the MAR hearing showed that, at the time of the crime, Carver suffered from carpal tunnel syndrome that required multiple surgeries. Dr. Vikram Shukla had treated Carver for mental health issues since 2005. Dr. Shukla described Carver as a "well-controlled paranoid schizophrenic" who took his medication. Dr. Shukla explained that, at the time of the crime, Carver was overweight and could not walk fast due to his asthma. Psychologist Ashley McKinney evaluated Carver in November 2016 and determined he had an "extremely low range" IQ of 61. Carver's family and friends testified that he could not read or write, needed help filling out forms, and struggled with memory and details. Carver's family and friends described how Carver struggled to lift heavy objects and hold items. Testimony indicated that Carver needs help with "anything physical," such as carrying groceries, loading his boat, netting fish, and tying his shoes.

¶ 14 The hearing provided numerous details regarding Carver's representation by his trial counsel. Counsel knew that Carver received disability payments and suffered from carpal tunnel syndrome. Counsel also was

aware of medical issues for both Carver and his cousin that were relevant to whether they could have committed the physical attack. Carver's counsel requested and received $4,000 from Indigent Defense Services to get a psychological evaluation of Carver. That evaluation never took place. Counsel knew Carver was illiterate and suffered from mental illness. Counsel did not obtain Carver's medical records.

¶ 15 In February 2010, Carver's counsel requested and received Indigent Defense Services funds for a DNA expert. He hired retired UNC Charlotte professor Dr. Ron Ostrowski. Counsel did not obtain Dr. Ostrowski's curriculum vitae or review his prior testimony. Dr. Ostrowski gave Carver's counsel "very rudimentary" instruction on the "nuts and bolts of DNA." He told counsel that the State's DNA evidence was "good science" and advised counsel not to interview the State's DNA experts. Carver's counsel did not receive a final report from Dr. Ostrowski and did not ask many of Dr. Ostrowski's recommended cross-examination questions at trial.

¶ 16 Dr. Maher Noureddine testified as a DNA expert at the MAR hearing. He stated that the SBI Crime Lab used "subjective" policies and procedures in DNA mixture interpretation during the time period when State analysts reviewed the touch DNA evidence in Carver's case. He explained that accepted DNA analysis guidelines from the Scientific Working Group on DNA Analysis Methods advised more "objective" interpretation of DNA mixtures. During the hearing, Dr. Noureddine estimated that 75-80 percent of forensic labs across the country had adopted the guidelines by the end of 2010. The SBI Crime Lab did not use these recommended guidelines when analyzing the DNA evidence in Carver's case.

¶ 17 Dr. Noureddine used the "more accurate and objective interpretation standards" developed by the Scientific Working Group on DNA Analysis Methods to review the SBI Crime Lab's interpretation of the DNA mixtures in Carver's case. He issued a report on 20 November 2016. His report concluded that the DNA mixture profile at the original 2011 trial could not be used for "any reliable matching" using current DNA techniques. According to the report, the profile was "inconclusive" and was not a confirmed match to Carver's DNA profile.

¶ 18 On 12 June 2019, the trial court granted Carver's motion for appropriate relief on grounds of ineffective assistance of counsel and newly discovered evidence. The trial court denied Carver's remaining claims. In granting Carver's ineffective assistance of counsel claim, the court concluded that it was "not reasonable" that Carver's trial counsel failed

to investigate his medical conditions and intellectual disabilities. The court also concluded that it was "not reasonable" that Carver's counsel failed to "independently and adequately research, investigate and educate himself on the science related to the one key piece of evidence in this case, 'Touch DNA.' "

¶ 19 Regarding the newly discovered evidence, the court accepted and adopted Dr. Noureddine's report, opinions, and conclusions "as facts for the purposes of supporting this Order." The trial court reasoned that new advances in the interpretation of DNA mixtures, which the SBI Crime Lab did not use during Carver's March 2011 trial, made the physical evidence "doubtful at best." The court held that Carver met his burden of proof and established both claims by a preponderance of the evidence and granted a new trial. The State appealed.

Analysis

¶ 20 We first address Carver's motion to dismiss on the basis that the State has no right to appeal the grant of a new trial based on ineffective assistance of counsel.

¶ 21 "[T]he State's right to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Howard*, 247 N.C. App. 193, 202, 783 S.E.2d 786, 793 (2016). Ordinarily, the State does not have a right to appeal from an order granting a criminal defendant's motion for appropriate relief. Instead, the State is limited to petitioning for a writ of certiorari—a form of discretionary appellate review. N.C. Gen. Stat. § 15A-1422(c)(3). But there is one exception: the General Statutes provide the State with a limited right to appeal "[u]pon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law." *Id.* § 15A-1445(a)(2).

¶ 22 Relying on this language from Section 15A-1445(a)(2), the State argues that it has a right to appeal from *every* ruling in the trial court's order in this case, including all issues concerning ineffective assistance of counsel, because the trial court "granted a new trial based in part on newly discovered evidence" and "the State has not taken appeal from any particular issue but from the trial court's order granting a new trial." In other words, the State believes it has a right to appeal because the order contains a grant of a motion for a new trial on newly discovered evidence—which the State has a right to appeal on questions of law—and thus every other portion of the challenged order becomes appealable by right as well.

¶ 23 This argument fails for several reasons. First, it runs counter to settled principles of appellate jurisdiction. Our jurisdictional doctrine does not recognize pendent appellate jurisdiction. So, for example, if a trial court denies the State's motion to dismiss based on sovereign immunity—a ruling that is immediately appealable—the State ordinarily cannot appeal the denial of its motion to dismiss on other grounds, even if those other rulings are contained in the same order. *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008). Instead, a right to appeal those other issues exists only if this Court finds those issues "inextricably intertwined with the issues before this Court as of right." *Id.*

¶ 24 This Court applied the "inextricably intertwined" rule in the MAR context in *Howard*. In that case, "the trial court granted defendant's MAR on three different legal grounds: (1) newly discovered evidence, (2) constitutional violations, and (3) 'favorable' post-conviction DNA test results." *Howard*, 247 N.C. App. at 201, 783 S.E.2d at 792. We held that "since all of the relief granted to defendant was inextricably linked to, and based on, what the court found to be newly discovered evidence, the State properly relied on subdivision 15A–1445(a)(2) as its ground for appellate review." *Id.* at 205, 783 S.E.2d at 794.

¶ 25 In its argument, the State relies largely on another case, *State v. Peterson*, in which this Court held that "because the trial court granted defendant's MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order." 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013). The State argues that *Peterson* rejected the "inextricably intertwined" doctrine and instead created a much broader rule for appeals in MAR cases. But the *Peterson* court resolved the case solely on the newly discovered evidence issue, explaining that it need not reach the remaining grounds on which the trial court granted a new trial. *Id.* at 347, 744 S.E.2d at 159. Moreover, in *Howard*, this Court examined *Peterson* and cited it in support of its "inextricably linked" holding. *Howard*, 247 N.C. App. at 205, 783 S.E.2d at 794. This indicates that *Peterson* and *Howard* are harmonized, and we must follow the holding of the most recent of those decisions, which is *Howard*. *See State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888 (2019).

¶ 26 Unlike the MAR grounds in *Howard*, which this Court concluded were inextricably linked, the newly discovered evidence issue and the ineffective assistance issue in this case are not inextricably linked. To the contrary—as the State conceded at oral argument—they are mutually exclusive. *See State v. Rhodes*, 366 N.C. 532, 537, 743 S.E.2d 37, 40 (2013). The newly discovered evidence claim is based on evidence that was unavailable to the defendant at the time of trial. The ineffective as-

sistance claim is based on other, separate evidence that the trial court found to be available to the defendant had his counsel exercised due diligence. Thus, these two claims are based on entirely separate facts and legal issues. They are not inextricably intertwined and thus the right to appeal one ruling does not confer a right to appeal the other. *Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793.

¶ 27 Even beyond these general jurisdictional principles, there is another reason why the State does not have a right to appeal every issue in the challenged order: the statute limits the State's right to appeal to the "granting of a motion for a new trial on the ground of newly discovered or newly available evidence *but only on questions of law*." N.C. Gen. Stat. § 15A-1445(a)(2) (emphasis added). The State's argument would render the phrase "but only on questions of law" superfluous. In the State's view, so long as the appeal is based, in part, on the grant of a new trial, the State can appeal *all* issues in that order, whether they involve questions of law or not. Indeed, a central part of the State's appeal is its challenge to the trial court's findings of fact concerning ineffective assistance, which the State contends "are not supported by evidence." But that interpretation would require us to ignore the specific limitations on the right to appeal that are contained in the statute—the opposite of what we must do for a statute that is "strictly construed" against the State's right to appeal. *Howard*, 247 N.C. App. at 202, 783 S.E.2d at 793.

¶ 28 Finally, we note that the State was not without options for seeking appellate review in this context. The General Statutes expressly permit the State to petition for a writ of certiorari to review an adverse MAR ruling. N.C. Gen. Stat. § 15A-1422(c)(3). The State chose not to file a petition for a writ of certiorari in this case, even after Carver moved to dismiss this appeal. Instead, the State asserted that this Court should walk back its holding in *Howard* and broaden the State's ability to appeal MAR rulings unfavorable to the State as a matter of right. Even if we believed the statute conferred this broader right to appeal—and we do not—we lack the authority to depart from our holding in *Howard*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). If the State is determined to fight the applicability of the "inextricably intertwined" principle in the MAR context, it will need to ask the Supreme Court to exercise its constitutional authority to conduct further review of *Howard* and the resulting jurisdictional doctrine.

¶ 29 In sum, we dismiss the State's appeal from the portion of the challenged order that grants Carver a new trial based on ineffective assistance of counsel. This, in turn, means the remaining portion of this appeal is rendered moot because the question of whether the trial court

erred by also granting a new trial based on newly discovered evidence "cannot have any practical effect" on the outcome of this case—either way, Carver will receive a new trial. *State v. Joiner*, 273 N.C. App. 611, 614, 849 S.E.2d 106, 110 (2020).

Conclusion

¶ 30 We dismiss for lack of appellate jurisdiction the portion of this appeal challenging the trial court's grant of a new trial on the basis of ineffective assistance of counsel. We dismiss the remaining portion of the appeal as moot.

DISMISSED.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BOBBY DEWAYNE HELMS

No. COA20-295

Filed 20 April 2021

Indictment and Information—multiple short-form indictments—charging same offense with same file number—facial validity

In a prosecution where defendant was indicted on two counts of first-degree statutory offense under one file number and two counts of taking indecent liberties with a child under another, with each charge appearing in separate short-form indictments with identical language for each type of offense, the trial court had jurisdiction over all four charges (as opposed to only one count of each offense). Each indictment complied with N.C.G.S. § 15A-924 (requiring a plain and concise factual statement supporting each element of an offense) and N.C.G.S. § 15-144.2 (allowing the use of short-form indictments for the offenses defendant was charged with), and therefore each indictment was facially valid. Moreover, the plain language of N.C.G.S. § 15A-926(a) does not require the State to join two counts of the same offense in one indictment.

Appeal by Defendant from judgment entered 22 October 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgment entered upon jury verdicts of guilty of two counts of first-degree statutory sex offense and two counts of taking indecent liberties with a child. Defendant contends that errors in the indictments divested the trial court of jurisdiction. We discern no error.

I. Background

¶ 2 On 2 April 2015, Defendant was arrested on two counts of first-degree statutory sex offense with a child under the age of thirteen, file number 15CR51369, and two counts of taking indecent liberties with a child, file number 15CR51370. On 6 July 2015, he was indicted on all four charges in a separate indictment for each count of each offense. The indictments for first-degree statutory sex offense were in file number 15CRS51369 and the indictments for taking indecent liberties with a child were in file number 15CRS51370. Each indictment was individually file-stamped and signed by the Assistant Deputy Clerk of Superior Court, and signed and dated by the Grand Jury Foreperson. Before trial, the State moved to join all four offenses for trial. Defendant acquiesced to joinder and the trial court granted the State's motion.

¶ 3 The case came on for trial on 24 April 2017 and Defendant was ultimately convicted of all four offenses. On appeal, this Court issued a split decision discerning no error. *See State v. Helms*, 261 N.C. App. 774, 818 S.E.2d 645 (2018) (unpublished). On appeal, the Supreme Court held that there was insufficient evidence to support one of the aggravating factors used in sentencing and remanded the case for a new sentencing hearing. *See State v. Helms*, 373 N.C. 41, 41-42, 832 S.E.2d 897, 897 (2019). On remand, the trial court arrested judgment on the indecent liberties convictions and sentenced Defendant to two consecutive sentences of 300 to 420 months in prison for the first-degree statutory sex offense convictions. Defendant gave oral notice of appeal.

II. Discussion

¶ 4 On appeal, Defendant contends that the trial court lacked jurisdiction over one count of first-degree statutory sex offense and one count

of taking indecent liberties with a child because one indictment for each offense was facially invalid. Specifically, Defendant argues that one indictment for each offense was facially invalid because he was charged by separate indictments with identical charging language for the first-degree statutory sex offenses in file number 15CRS51369, and separate indictments with identical charging language for the offenses of taking indecent liberties with a child in file number 15CRS51370.

¶ 5 As a threshold matter, Defendant's argument as to the facial validity of his indictments is properly before this Court, despite his failure to object in the trial court or to raise this issue on his first appeal. Generally, a defendant waives any appellate challenges to an indictment when the indictment is not challenged in the trial court. *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001) (citation omitted); *see also* N.C. Gen. Stat. § 15A-952(b)(6) (listing specific pretrial motions defendants must make prior to arraignment). However, "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *Call*, 353 N.C. at 429, 545 S.E.2d at 208 (quotation marks and citation omitted). Accordingly, Defendant's challenge to his indictments is properly before this Court.

¶ 6 "A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, and to give authority to the court to render a valid judgment." *State v. Stephenson*, 267 N.C. App. 475, 478, 833 S.E.2d 393, 397 (2019) (quotation marks and citation omitted). An indictment must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2015). An indictment is "constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. McGriff*, 151 N.C. App. 631, 634, 566 S.E.2d 776, 778 (2002) (citation omitted). "In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App.

692, 699, 507 S.E.2d 42, 46 (1998) (citation omitted). Moreover, it is "generally true tha[t] an indictment need only allege the ultimate facts constituting the elements of the criminal offense and that evidentiary matters need not be alleged." *Id.*

¶ 7 "[O]ur statutes permit, and our appellate courts have upheld, the use of short form indictments in charging a defendant with a sex[] offense and taking indecent liberties with a child." *State v. Mueller*, 184 N.C. App. 553, 558, 647 S.E.2d 440, 445 (2007) (citations omitted). N.C. Gen. Stat. §15-144.2 allows for these "short-form indictments" and provides:

> If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

N.C. Gen. Stat. § 15-144.2(b) (2015). Our appellate courts have consistently held that indictments conforming with this statute also comply with the North Carolina and the United States Constitution. *See*, *e.g.*, *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342 (2000); *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984); *State v. Lowe*, 295 N.C. 596, 603-04, 247 S.E.2d 878, 883-84 (1978). If a defendant wishes additional information about the specific "sexual act" charged, he may move for a bill of particulars. *State v. Johnson*, 253 N.C. App. 337, 343, 801 S.E.2d 123, 126-27 (2017) (citation omitted).

¶ 8 "Two or more offenses *may* be joined in one [indictment] . . . when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2019) (emphasis added). When offenses are joined pursuant to section 15A-926, "[e]ach offense must be stated in a separate count as required by [N.C. Gen. Stat. §] 15A-924." *Id.*

¶ 9 Defendant's indictments for first-degree statutory sex offense read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above

> unlawfully, willfully, and feloniously did engage in a sex offense with [victim], a child under the age of 13 years.

The indictments allege Defendant engaged in a sex offense with a child under the age of thirteen, in compliance with N.C. Gen. Stat. § 15-144.2(b), and contain a plain and concise factual statement asserting every other element of the offense, in compliance with N.C. Gen. Stat. § 15A-924(a)(5).

¶ 10 Defendant's indictments for taking indecent liberties with a child read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did take and attempt to take immoral, improper, and indecent liberties with the child named below for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of the child named below. At the time of this offense, the child named below was under the age of 16 years and the defendant named above was over 16 years of age and the defendant at least five years older than the child. The name of the child is [victim].

The indictments allege that Defendant committed a lewd and lascivious act, in compliance with N.C. Gen. Stat. § 15-144.2(b), and contain a plain and concise factual statement asserting every other element of the offense, in compliance with N.C. Gen. Stat. § 15A-924(a)(5).

¶ 11 Accordingly, each of the indictments complied with the requirements of the relevant statutory provisions. *See Mueller*, 184 N.C. App. at 577, 647 S.E.2d at 457 (rejecting defendant's challenge to the sufficiency of his short-form indictments because each indictment complied with N.C. Gen. Stat. § 15-144.2 and otherwise mirrored the statutory language for each substantive offense). Additionally, as the plain language of N.C. Gen. Stat. § 15A-926 permits, but does not require, joinder of offenses in one indictment, the State was not required to join Defendant's first-degree statutory sex offenses or taking indecent liberties with a child offenses into a single indictment with each offense as a separate count.

¶ 12 Defendant concedes that the indictments complied with N.C. Gen. Stat. § 15A-924(a) and N.C. Gen. Stat. § 15-144.2. Defendant also con-

cedes that the State was not required to join the offenses under N.C. Gen. Stat. § 15A-926. To the extent Defendant argues he was unable to distinguish the indictments in 15CRS51369 or 15CRS51370 because "nothing in the record shows that these virtually identical indictments were not duplicate originals[,]" his argument is meritless because, as Defendant concedes, the "handwritten check mark, date, and signatures" are "slightly different" on each indictment.

¶ 13 In a nutshell, Defendant asks this Court to adopt a new rule by holding that, when read together, N.C. Gen. Stat. § 15A-924 and N.C. Gen. Stat. § 15A-926(a) bar the State from using multiple short-form indictments charging the same offense with the same file number. We decline to so hold.

III. Conclusion

¶ 14 Defendant's challenge to the indictments as facially invalid lacks merit. We discern no error.

NO ERROR.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
ROMAN JERONE IRVINS

No. COA20-586

Filed 20 April 2021

Indictment and Information—indictment—habitual larceny—facially invalid—attempted larceny not an eligible count to support indictment

Where defendant's indictment for felony habitual larceny was facially invalid because it included an attempted larceny conviction, which was not an eligible count for habitual larceny pursuant to N.C.G.S. § 14-72(b)(6), the judgment on defendant's conviction for habitual larceny was arrested. Since the indictment sufficiently alleged misdemeanor larceny, the matter was remanded for sentencing and entry of judgment on that offense. Finally, the judgment entered on defendant's guilty plea to habitual felon status was reversed and remanded for dismissal.

STATE v. IRVINS

[277 N.C. App. 101, 2021-NCCOA-143]

Appeal by Defendant from judgment entered 23 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna A. Hart, for the State-Appellee.

Edward Eldred for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgment entered upon a jury verdict of guilty of felony habitual larceny and a plea of guilty to attaining habitual felon status. Defendant contends that his indictment for felony habitual larceny was facially invalid because an attempted larceny conviction is not an eligible count of larceny to support an indictment for felony habitual larceny under N.C. Gen. Stat. § 14-72(b)(6). We agree. We arrest judgment on Defendant's habitual larceny conviction and remand to the trial court for sentencing and entry of judgment for misdemeanor larceny. We reverse the judgment entered upon Defendant's guilty plea to the habitual felon charge and remand to the trial court for dismissal.

I. Background

¶ 2 Defendant was indicted on 28 January 2019 for felony habitual larceny and attaining habitual felon status. The felony habitual larceny indictment alleged that Defendant "did unlawfully, willfully, and feloniously steal, take and carry away three (3) sets of headphones, the personal property of Target Stores, Incorporated," and had the following four larceny convictions: (1) misdemeanor larceny on 22 October 2008 in Union County; (2) misdemeanor larceny on 19 June 2012 in Mecklenburg County; (3) habitual larceny on 2 November 2015 in Union County; and (4) misdemeanor larceny on 6 June 2016 in Union County. The State moved to amend the felony habitual larceny indictment to allege that Defendant's conviction on 22 October 2008 was for attempted misdemeanor larceny rather than misdemeanor larceny, which the trial court allowed over Defendant's objection. Defendant was ultimately found guilty of felony habitual larceny and pled guilty to attaining habitual felon status, while reserving the right to appeal the felony habitual larceny conviction. Defendant was sentenced to 77 to 105 months in prison. Defendant gave oral notice of appeal.

II. Standard of Review

¶ 3 "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted). This Court reviews the sufficiency of an indictment *de novo*. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019).

III. Analysis

¶ 4 Defendant's sole argument on appeal is that his indictment for felony habitual larceny was facially invalid because an attempted larceny conviction is not an eligible count of larceny to support an indictment for felony habitual larceny under N.C. Gen. Stat. § 14-72(b)(6).

¶ 5 To be sufficient under our Constitution, an indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (citation omitted); *see also State v. Brice*, 370 N.C. 244, 250, 806 S.E.2d 32, 36-37 (2017) (noting that defendant's indictment for felony habitual larceny alleged all essential elements because, in part, it alleged defendant had four prior convictions for misdemeanor larceny). "[A] criminal defendant is guilty of the felony of habitual misdemeanor larceny in the event that he or she took the property of another and carried it away without the owner's consent and with the intent to deprive the owner of his property permanently," *Brice*, 370 N.C. at 248, 806 S.E.2d at 35 (quotation marks and citation omitted), "after having been previously convicted of an eligible count of larceny on four prior occasions." *Id.* at 248, 806 S.E.2d at 36 (citing N.C. Gen. Stat. § 14-72(b)(6)).

¶ 6 An eligible count of larceny is a conviction in this State, or in any other jurisdiction, for: (1) any offense of larceny under N.C. Gen. Stat. § 14-72; (2) any offense "deemed or punishable as larceny" under N.C. Gen. Stat. § 14-72; or (3) "any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies or a combination thereof[.]" N.C. Gen. Stat. § 14-72(b)(6) (2019).

¶ 7 The common law elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. *State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985). Larceny is punishable under N.C. Gen. Stat. § 14-72. Larceny is a Class 1 misdemeanor "where the value of the property or goods is not

more than one thousand dollars ($ 1,000)[.]" N.C. Gen. Stat. § 14-72(a). Larceny is a felony where evidence supports additional statutory elements set forth in N.C. Gen. Stat. § 14-72(a) and (b).

¶ 8 "Attempted larceny is a lesser-included offense of larceny." *State v. Primus*, 227 N.C. App. 428, 431, 742 S.E.2d 310, 313 (2013) (citation omitted). An attempt is an "intentional 'overt act' done for the purpose of committing a crime but falling short of the completed crime." *State v. Broome*, 136 N.C. App. 82, 87, 523 S.E.2d 448, 453 (1999) (citations omitted). As the State concedes, "attempted larceny is not a completed larceny under N.C. [Gen. Stat.] §14-72[.]"

¶ 9 Attempted misdemeanor larceny is not "deemed or punishable" as larceny under N.C. Gen. Stat. § 14-72. Pursuant to N.C. Gen. Stat. § 14-2.5, "[u]nless a different classification is expressly stated, . . . an attempt to commit a misdemeanor . . . is punishable under the next lower classification as the offense which the offender attempted to commit." N.C. Gen. Stat. § 14-2.5 (2019). Neither section 14-72 nor 14-2.5 expressly state the classification for an attempted misdemeanor larceny. Accordingly, attempted misdemeanor larceny is punishable under N.C. Gen. Stat. § 14-2.5 as a Class 2 misdemeanor, the next lower classification of a Class 1 misdemeanor larceny under N.C. Gen. Stat. § 14-74(a).

¶ 10 Finally, it is uncontested that Defendant's conviction for attempted misdemeanor larceny was from Union County, North Carolina, so it is not a "substantially similar offense" from another jurisdiction. *See* N.C. Gen. Stat. 14-72(b)(6).

¶ 11 Because attempted misdemeanor larceny does not fit within any of the three statutory categories set forth in N.C. Gen. Stat. § 14-72(b)(6), attempted larceny is not an eligible count of larceny to support an indictment for felony habitual larceny.

¶ 12 The State argues that because the indictment alleges Defendant had a prior conviction for habitual larceny, that conviction is evidence that Defendant had four eligible convictions for larceny. However, as "[t]he purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense[,]" *State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), an indictment "must allege lucidly and accurately all the essential elements of the offense endeavored to be charged[,]" *Hunt*, 357 N.C. at 267, 582 S.E.2d at 600. Accordingly, a habitual larceny indictment must specifically allege each of the four eligible counts of larceny of which a defendant was convicted. *See Brice*, 370 N.C. at 249-50, 806 S.E.2d at 36-37 (a habitual larceny indictment must allege the defendant was convicted of "an eli-

gible count of larceny" on "four separate occasions"). A prior habitual larceny conviction is only one eligible count of larceny for purposes of N.C. Gen. Stat. § 14-72(b)(6).

¶ 13 Because attempted misdemeanor larceny is not an eligible count of larceny to support an indictment for felony habitual larceny under N.C. Gen. Stat. § 14-72(b)(6), the indictment failed to allege all essential elements of this offense. "When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment." *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23 (citations omitted). Accordingly, we arrest judgment on Defendant's felony habitual larceny conviction.

¶ 14 Generally, "[t]he legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966) (citations omitted). However, "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *Bullock*, 154 N.C. App. at 245, 574 S.E.2d at 24. As Defendant's indictment sufficiently alleged misdemeanor larceny and the jury's verdict of guilty of felony habitual larceny necessarily means that they found all of the elements of the lesser-included offense of misdemeanor larceny, we remand this case to the trial court for sentencing and entry of judgment for misdemeanor larceny. *See id.* at 245, 574 S.E.2d at 24 (remanding defendant's case to the trial court for imposition of judgment on attempted voluntary manslaughter as a lesser-included offense of attempted first degree murder, because all of the elements of attempted voluntary manslaughter were alleged in the indictment).

¶ 15 Furthermore, because the judgment for Defendant's conviction for felony habitual larceny has been arrested and the case remanded to the trial court for sentencing and entry of judgment for misdemeanor larceny, the judgment entered upon Defendant's guilty plea to the habitual felon charge must be reversed and remanded to the trial court for dismissal. *See State v. Flint*, 199 N.C. App. 709, 717, 682 S.E.2d 443, 448 (2009) ("In North Carolina, an habitual felon indictment must be ancillary to a substantive felony and cannot stand on its own.") (citation omitted).

IV. Conclusion

¶ 16 Defendant's indictment was facially invalid because it failed to contain allegations of four eligible larceny convictions, an essential element

of a felony habitual larceny indictment. The judgment on Defendant's felony habitual larceny conviction is arrested and the case is remanded to the trial court for sentencing and entry of judgment for misdemeanor larceny. Defendant's guilty plea to the habitual felon charge is reversed and remanded to the trial court for dismissal.

JUDGMENT ARRESTED IN PART; REVERSED IN PART; AND REMANDED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES LEROY JACKSON, JR.

No. COA20-142

Filed 20 April 2021

1. Drugs—possession with intent to sell or deliver—cocaine—possible contamination—weight of evidence

The State presented substantial evidence from which the jury could convict defendant of possession of cocaine with intent to sell or deliver, including evidence that defendant gave two white rocks to an undercover detective, who handled them with his bare hands, and that the rocks were later analyzed and determined to contain cocaine. Defendant's argument that the rocks could have been contaminated went to the weight and credibility of the evidence, not to sufficiency.

2. Evidence—authentication—chain of custody—cocaine—possible contamination

In a drug prosecution, there was no plain error in the admission into evidence of two white rocks, which defendant gave to an undercover detective and which were later analyzed and found to contain cocaine. Although defendant argued that the rocks may have been contaminated when the detective handled them with his bare hands and stored them in an area that may have had residue from earlier undercover activity, and therefore could not be authenticated pursuant to Evidence Rule 901(a), defendant's challenge went to the weight of the evidence rather than admissibility.

3. Criminal Law—drug case—jury instructions—goal of reaching unanimous decision—not unduly coercive

In a drug prosecution, the trial court's instructions that the jury should resume deliberations with the goal of reaching a unanimous decision was not so coercive as to constitute fundamental error requiring a new trial. The totality of the instructions, given after the jury indicated it could not reach a unanimous verdict, were in accordance with N.C.G.S. § 15A-1235 and did not compel any juror to abandon his or her well-founded judgment to the views of the majority.

Appeal by defendant from judgment entered 8 March 2019 by Judge Peter B. Knight in Buncombe County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for defendant.

DIETZ, Judge.

¶ 1 Defendant James Jackson appeals his conviction for possession of cocaine with intent to sell or deliver. Jackson argues that he sold two white rocks to an undercover detective who handled them with his bare hands and then placed them into the console area of his car without securing them. Thus, Jackson argues, those white rocks were exposed to potential contaminants and were either inadmissible or so compromised that they could not constitute substantial evidence of the crime.

¶ 2 We reject these arguments. Jackson's concerns about the handling of this physical evidence go to weight and credibility, not admissibility, and the evidence readily was sufficient to send the charge to the jury.

¶ 3 Jackson also contends that the trial court erred by informing the jury that they should have the "goal" of reaching a unanimous verdict. The challenged instruction occurred after the trial court already provided detailed instructions to ensure that jurors understood they were not compelled to reach a unanimous verdict. In light of those instructions, the jury understood that it should deliberate and reach a unanimous verdict if possible but was not compelled to do so. Accordingly, we reject this argument as well and find no error in the trial court's judgment.

Facts and Procedural History

¶ 4 In 2017, an undercover detective with the Asheville Police Department drove into an apartment complex, displayed some cash, and indicated that he was looking to buy drugs. A woman directed him to Defendant James Jackson. Jackson took the money from the detective and then handed him what the detective described as two "little rocks of crack cocaine." These "rocks" were unpackaged and the detective handled them with his bare hands. When the detective returned to his car, he put the two unpackaged rocks in the console area. The detective then drove back to the police station, put the items in a secure envelope, entered them into the computer system, and then deposited them in the property room drop box, where they stayed until they were delivered for laboratory testing.

¶ 5 The State charged Jackson with selling a mixture containing cocaine and possession with intent to sell or deliver a mixture containing cocaine. At trial, a forensic scientist testified that the rocks purchased by the detective contained cocaine. The detective also testified that he visually identified the substance as cocaine.

¶ 6 The jury acquitted Jackson of selling cocaine and convicted him of possession with intent to sell or deliver cocaine. The trial court sentenced Jackson to 16 to 29 months in prison. Jackson appealed.

Analysis

I. Sufficiency of evidence of possession of a controlled substance

¶ 7 **[1]** Jackson first challenges the denial of his motion to dismiss. He contends that the white rocks he sold to the detective were contaminated when the detective handled them with his bare hands, rendering any laboratory testing unreliable. Thus, he argues, there was no substantial evidence that the rocks actually contained cocaine.

¶ 8 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A trial court properly denies a motion to dismiss if there is substantial evidence that the defendant committed each essential element of the charged offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

¶ 9 "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or dis-

tribute the controlled substance." *State v. Yisrael*, 255 N.C. App. 184, 187–88, 804 S.E.2d 742, 744 (2017), *aff'd per curiam*, 371 N.C. 108, 813 S.E.2d 217 (2018). Jackson focuses on the second element, arguing that the State's evidence "only raised a suspicion" that the white rocks were cocaine. This is so, Jackson argues, because the detective handled the rocks with his bare hands, admitted to handling cocaine with his bare hands earlier that same day, and admitted to putting the white rocks in the same area of his car that he previously stored other seized cocaine earlier that day. Thus, Jackson argues, the State failed to present sufficient evidence to show that, at the time Jackson sold the white rocks to the officer, those rocks contained cocaine.

¶ 10 To be sure, Jackson's argument is one that a jury could consider when evaluating the weight to give to the laboratory testing, because the detective might have inadvertently contaminated the evidence with cocaine residue from earlier investigations. But these are questions of weight and credibility. The State unquestionably presented sufficient evidence from which a reasonable juror could conclude that the State proved each element of the charged offense. *State v. Blackmon*, 208 N.C. App. 397, 401, 702 S.E.2d 833, 836 (2010). Accordingly, the trial court did not err by denying the motion to dismiss.

II. Admissibility of controlled substance

¶ 11 **[2]** Jackson next argues that the trial court plainly erred by admitting the white rocks into evidence because the possibility of contamination prevented the evidence from properly being authenticated under the Rules of Evidence. Jackson acknowledges that he did not object to the admission of this evidence and thus we can review this argument solely for plain error.

¶ 12 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 13 "Rule 901(a) requires that evidence be authenticated by showing that the matter in question is what its proponent claims." *State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016). Thus, before physical evidence is admitted, it "must be identified as being the same object involved in

the incident and it must be shown that the object has undergone no material change." *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). The trial court has "sound discretion in determining the standard of certainty" necessary to satisfy this test. *Id.* at 388–89, 317 S.E.2d at 392.

¶ 14 The possibility that physical evidence has been contaminated does not, by itself, bar that evidence from being authenticated and admitted. In *State v. Mandina*, for example, the State introduced carpet fibers taken from a car used in a burglary. 91 N.C. App. 686, 696–97, 373 S.E.2d 155, 161–62 (1988). The defendant argued that the fibers were inadmissible because, after law enforcement found the car, its owner moved it "to make room in the garage" and officers did not return to seize the car until several days later. Thus, the defendant argued, there was "no clean chain of custody." *Id.*

¶ 15 The Supreme Court rejected this argument, holding that "defendant's argument, strictly analyzed, does not raise a chain of custody problem" *Id.* at 696, 373 S.E.2d at 162. "Rather, defendant argues that the *source* of the evidence, the vehicle, had been contaminated by the possible introduction of fibers by third parties due to the State's failure to secure the vehicle." *Id.* at 696–97, 373 S.E.2d at 162. "In our view, as long as the State laid proper foundation authenticating the evidence as the fibers actually seized from the vehicle, defendant's argument goes to the weight of the evidence rather than to the admissibility of it." *Id.* at 697, 373 S.E.2d at 162 (citation omitted).

¶ 16 The same is true here. Jackson does not argue that the State failed to establish that the white rocks tested in the laboratory were the ones the detective purchased from Jackson in the undercover drug operation. Instead, Jackson argues that there is a possibility that those white rocks were contaminated when the detective handled them with his bare hands and placed them in an area of his car that may have been exposed to drug residue from earlier undercover activity. Under *Mandina*, these arguments go "to the weight of the evidence rather than to the admissibility of it." *Id.* We therefore find no error, and certainly no plain error, in the trial court's admission of the challenged evidence.

III. Jury instructions on further deliberations

¶ 17 **[3]** Lastly, Jackson asserts that the trial court's instructions that the jury resume their deliberations "with the goal of reaching a unanimous decision as to each charge" were unduly coercive.

¶ 18 We review this issue de novo. *State v. Gettys*, 219 N.C. App. 93, 101, 724 S.E.2d 579, 586 (2012). Jury instructions encouraging the jury to con-

tinue deliberations and reach a unanimous verdict often are referred to as *Allen* charges because the doctrine originated from *Allen v. United States*, 164 U.S. 492, 501–02 (1896).

¶ 19 In North Carolina, *Allen* charges are governed by a statute. N.C. Gen. Stat. § 15A-1235. When a jury indicates that it is unable to reach a unanimous verdict, the trial court can instruct the jury that: "(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors; (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict." N.C. Gen. Stat. § 15A-1235(b).

¶ 20 A "charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Gillikin*, 217 N.C. App. 256, 262, 719 S.E.2d 164, 168 (2011). Thus, the trial court "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." N.C. Gen. Stat. § 15A-1235(c). Telling the jury they must deliberate "until" they reach a unanimous verdict, for example, is "compelling, coercive language" that is impermissible. *Gillikin*, 217 N.C. App. at 265, 719 S.E.2d at 170.

¶ 21 In this case, the jury sent a note after the first day of deliberations explaining that "[a]t this moment we cannot come to a unanomous [*sic*] decision on neither guilty or not guilty." In response, the court properly instructed the jury using the language of N.C. Gen. Stat. § 15A-1235 before sending the jury home for the night. The next morning, when the jury returned, the court instructed the jury, telling them, "I will now release you to the jury room to resume your deliberations with a goal of reaching a unanimous decision as to each charge."

¶ 22 Jackson argues that the trial court's instruction to resume deliberations "with a goal of reaching a unanimous decision," which was given separately from the full *Allen* instructions the previous evening, was unduly coercive and resulted in a defective jury verdict. We reject this argument. The trial court properly gave the required *Allen* instructions to ensure that jurors understood they were not compelled to reach a unanimous verdict. In light of those instructions, the trial court's decision,

when deliberations resumed, to inform the jury that they should have the "goal" of reaching a unanimous verdict did not compel any juror to "surrender his well-founded convictions or judgment to the views of the majority." *Gillikin*, 217 N.C. App. at 262, 719 S.E.2d at 168. It simply reinforced that the jury's charge was to deliberate and reach a unanimous verdict if possible. We thus find no error in the trial court's instructions.

Conclusion

¶ 23 We find no error in the trial court's judgment.

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ERIC MYRICK, DEFENDANT

No. COA20-689

Filed 20 April 2021

Constitutional Law—due process—competency to stand trial—no determination—defendant subsequently found not guilty by reason of insanity

In an assault case, the trial court violated defendant's constitutional due process rights, and the statutory mandate in N.C.G.S. § 15A-1001(a), by finding defendant not guilty by reason of insanity (NGRI) and ordering him involuntarily committed without first determining whether defendant had capacity to proceed, despite holding a hearing on that issue.

Appeal by Defendant from order entered 31 July 2019 by Judge J. Carlton Cole in Bertie County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Eric Myrick ("Defendant") appeals from an order finding him not guilty by reason of insanity ("NGRI") and involuntarily committing him to Central Regional Hospital. Defendant argues that the trial court erred and violated his right to due process by finding him NGRI without determining whether he was capable to proceed. Upon review, we agree. We therefore vacate the order and remand for a determination of Defendant's capacity.

I. Factual and Procedural Background

¶ 2 Defendant was arrested and charged for assault inflicting physical injury on a detention employee (a class I felony) in March 2019. Defendant's counsel filed a motion seeking an examination of Defendant's capacity to proceed. The trial court granted this motion on 3 April 2019. On 15 April 2019, a grand jury indicted Defendant for the charged assault.

¶ 3 Jill C. Volin, M.D., interviewed Defendant on 26 April 2019 and subsequently prepared a forensic evaluation of his capacity to proceed. Dr. Volin opined that Defendant was "incapable to proceed due to untreated psychosis." Dr. Volin described Defendant as "floridly psychotic . . . and manic" and characterized his responses as "a relentless string of disorganized and delusional statements." However, Dr. Volin opined that Defendant was "restorable" with treatment.

¶ 4 At the request of the prosecutor and Defendant's counsel, the trial court found Defendant NGRI and ordered that he be involuntarily committed to Central Regional Hospital. Defendant was not present for this court proceeding. The written order was filed on 31 July 2019. The trial court did not make a finding, either in court or in the written order, regarding Defendant's capacity to proceed.

¶ 5 Defendant gave *pro se* written notice of appeal on 1 April 2020, and the Office of the Appellate Defender was appointed to represent him. Because Defendant's appeal was untimely, he filed a Petition for Writ of Certiorari on 18 September 2020. On 25 September 2020, the State filed a response to the Petition for Writ of Certiorari and a Motion to Dismiss Appeal. Defendant filed a Second Petition for Writ of Certiorari on 28 September 2020, which corrected the original Petition by including an addendum with a copy of the appealed order and other documents in the Record.

II. Analysis

A. Appellate Jurisdiction

¶ 6 Pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, a defendant may appeal from a judgment or order in a criminal case by either "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order." N.C. R. App. P. 4(a). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (citations omitted).

¶ 7 In this case, Defendant failed to comply with Rule 4's notice requirement, thereby depriving this Court of jurisdiction to hear his appeal as of right. *Id.* In acknowledgment of this error, however, Defendant has filed a Petition for Writ of Certiorari requesting discretionary review of his appeal. Appellate Rule 21(a) provides that this Court may issue a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1). Although Defendant's first Petition for Writ of Certiorari failed to include the order from which Defendant appeals, Defendant has filed a second Petition for Writ of Certiorari which corrected that error. *See* N.C. R. App. P. 21(c) (requiring a petition for writ of certiorari to include "certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition").

¶ 8 The State argues that the trial court's order was interlocutory. However, even assuming *arguendo* that the order was interlocutory, we may review an interlocutory criminal appeal "in the event that the defendant files a petition for writ of *certiorari*, where we can use our discretion to hear the merits of an otherwise barred case." *State v. Doss*, 268 N.C. App. 547, 550, 836 S.E.2d 856, 858 (2019) (citation omitted); N.C. R. App. P. 21(a)(1) (allowing this Court to issue writ of certiorari to permit review "when no right of appeal from an interlocutory order exists").

¶ 9 This Court has granted petitions for writ of certiorari where petitioners demonstrated "good faith efforts in making a timely appeal and because [the] appeal ha[d] merit." *State v. High*, 230 N.C. App. 330, 332-33, 750 S.E.2d 9, 12 (2013). "We therefore dismiss [his] appeal, exercise our discretion to grant Defendant's petition for writ of certiorari, and proceed to address the merits of [his] arguments." *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015) (citation omitted).

B. Standard of Review

¶ 10 We review *de novo* alleged violations of statutes, *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012) (citation omitted), and constitutional rights, *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

C. NGRI Order Without Capacity Determination

¶ 11 The trial court held a hearing to determine Defendant's capacity to proceed but made no findings regarding whether Defendant was capable of proceeding. The trial court bypassed this necessary step and found Defendant NGRI. This error was contrary to statutory mandate, violated Defendant's right to due process, and prejudiced Defendant.

¶ 12 The Criminal Procedure Act provides, in pertinent part:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2019).

¶ 13 "When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b)(1) (2019). This hearing should take place after examination of the defendant, if the court ordered such an examination pursuant to §15A-1002(b)(1a) or (2). *Id.* "The order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b1). The parties may not stipulate that the defendant lacks capacity to proceed. *Id.* By failing to make a determination of Defendant's capacity (which had been questioned) and failing to make findings of fact to support that determination, the trial court acted contrary to statutory mandate.

¶ 14 Defendant's attorney lacked authority to enter a plea on Defendant's behalf. *See id.* (stating parties may not stipulate that a defendant lacks capacity to proceed); *see also State v. Payne*, 256 N.C. App. 572, 577-78, 808 S.E.2d 476, 480-81 (2017) (holding that trial court violated the defendant's constitutional right to assistance of counsel by allowing her

attorney to pursue pre-trial determination of NGRI against the defendant's express wishes). An attorney's implied authority to make stipulations on behalf of her client is normally limited to procedural matters, and "in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld." *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991) (citation omitted). The Record does not indicate that Defendant agreed to, or was even consulted about, a plea of NGRI.

¶ 15 The entry of a plea of NGRI, without a prior determination that Defendant was capable of proceeding, violated Defendant's right to due process. *See Medina v. California*, 505 U.S. 437, 448 (1992) ("[D]ue process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him. The entry of a plea of not guilty by reason of insanity, by contrast, presupposes that the defendant is competent to stand trial and to enter a plea." (citations omitted)). Although this Court has not found a decision by this Court or our Supreme Court directly addressing this issue, other jurisdictions have held that accepting a NGRI plea from an incompetent defendant violates due process. *State ex rel. Kelly v. Inman*, ___ S.W.3d ___, ___, 2020 Mo. LEXIS 6, 2020 WL 203148 (Mo. 2020); *Thompson v. Crawford*, 479 So.2d 169, 180-81 (Fla. Dist. Ct. App. 1985). *See also White v. United States*, 470 F.2d 727, 728 (5th Cir. 1972) (holding that an incompetent defendant cannot enter a plea); *Coolbroth v. District Court of Seventeenth Judicial Dist.*, 766 P.2d 670, 671-72 (Colo. 1988) (holding that trying an incompetent defendant based on NGRI plea would violate due process); *State v. English*, 424 P.2d 601, 607-08 (Kan. 1967) ("[A]n insane person cannot be required to plead to a criminal charge and cannot be tried."); *State v. Champagne*, 497 A.2d 1242, 1247-48 (N.H. 1985) (noting that the same standard of competency applies to both ability to stand trial and ability to plead NGRI); *Commonwealth v. Harris*, 243 A.2d 408, 409 (Pa. 1968) (noting that a mentally incompetent person "should not be required to either stand trial or plead to a criminal indictment"); *State v. Smith*, 564 P.2d 1154, 1155 (Wash. 1977) (holding that a NGRI plea was invalid because the defendant was incompetent when plea was entered), *overruled on other grounds by State v. Jones*, 664 P.2d 1216 (Wash. 1983).

¶ 16 The trial court's error violated Defendant's right to due process and will prejudice him going forward. As an insanity acquittee, Defendant bears the burden of proof at rehearing to demonstrate that he no longer has a mental illness. N.C. Gen. Stat. § 122C-276.1(c) (2019). Were he not

an insanity acquittee, Defendant would not bear this burden of proof. *See* N.C. Gen. Stat. § 122C-276 (2019) (describing rehearing process for respondents other than insanity acquittees).

¶ 17 A criminal defendant who lacks the capacity to proceed is entitled to have his charge dismissed without leave after being confined for the maximum length permissible as a prior record level IV offender. N.C. Gen. Stat. § 15A-1008(a)(2), (b) (2019). Here, Defendant has been confined since March 2019 on a class I felony charge, for which the maximum aggravated sentence at prior record level IV is twenty-one months. N.C. Gen. Stat. § 15A-1340.17(c)-(d) (2019).

III. Conclusion

¶ 18 For the foregoing reasons, we vacate the NGRI order and remand for a determination of Defendant's capacity to proceed. If Defendant is found incapable of proceeding, the charge against him should be dismissed. N.C. Gen. Stat. § 15A-1008(a)(2).

VACATED AND REMANDED.

Judges INMAN and WOOD concur.

STATE OF NORTH CAROLINA
v.
JONATHAN JOSE POSNER

No. COA20-462

Filed 20 April 2021

1. Appeal and Error—writ of certiorari—jurisdiction to grant—good cause shown—guilty plea—sentencing error

The Court of Appeals was not limited by Appellate Rule 21—and had jurisdiction pursuant to N.C.G.S. § 7A-32(c)—to grant defendant's petition for writ of certiorari to review his argument that, although he pleaded guilty to two larceny offenses, judgment should not have been entered on both because they arose from a single taking. There was good cause to grant the petition where defendant's argument showed merit and significant sentencing consequences would result from the error.

2. Larceny—multiple counts—single taking rule—same transaction—same time and place

Defendant could not be convicted of both felony larceny of property taken during a breaking or entering and larceny of a firearm where both offenses arose from a single continuous transaction during which defendant took multiple items at the same time and from the same place. Therefore, pursuant to the "single taking rule," the matter was remanded for the trial court to arrest judgement on one of the larceny convictions.

3. Sentencing—prior record level—calculation—reclassification of misdemeanor—elements included in prior offense—prejudice

After defendant pleaded guilty to five felonies arising from a home invasion, the trial court committed prejudicial error by miscalculating defendant's prior record level. Although one point was added for a prior conviction of possession of drug paraphernalia, which at the time of offense was classified as a Class 1 misdemeanor, that offense was later reclassified as a Class 3 misdemeanor, for which no points could be added. Further, an additional point that was added pursuant to N.C.G.S. § 15A-1340.14(b)(6) (all elements of present offense are included in any prior offense) should not have been added to three of the current offenses because they did not share the same elements. The combined effect of the two errors resulted in defendant being sentenced as a Level V rather than a Level IV offender for three of his convictions.

Appeal by Defendant from judgments entered 11 December 2019 by Judge Alma Hinton in Franklin County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony Pittman, for the State-Appellee.

Edward Eldred for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgments entered upon pleas of guilty to five felonies, including felony larceny of property taken pursuant to a breaking or entering and larceny of a firearm. Defendant contends that the trial court erred by sentencing him for the two larceny convictions as they were part of the same transaction and by miscalculating his prior record level during sentencing. We remand with instructions to

arrest judgment on one of the larceny convictions and for a new sentencing hearing.

I. Factual and Procedural Background

¶ 2 Defendant Jonathan Posner pled guilty on 11 December 2019 to robbery with a dangerous weapon, felony breaking or entering, felony larceny of property taken pursuant to a breaking or entering, felony larceny of a firearm, possession of a firearm by a felon, and felony speeding to elude arrest.

¶ 3 The trial court accepted Defendant's plea and entered a consolidated judgment for the felony breaking or entering and felony larceny pursuant to a breaking or entering, and separate judgments for each of the remaining offenses. One felony prior record level worksheet was completed, which calculated Defendant to be a prior record level V with fifteen prior points. The trial court sentenced Defendant to 178 to 263 months in prison. Defendant entered timely notice of appeal and filed a petition for writ of certiorari on 10 August 2020.

II. Discussion

A. Larceny

¶ 4 **[1]** Defendant petitions this Court to issue a writ of certiorari to address whether the trial court erred by entering judgments for both felony larceny of property taken pursuant to a breaking or entering and felony larceny of a firearm because both larcenies were a part of a "single taking" in the same transaction at the same time and place.

¶ 5 Defendant pled guilty to these larceny offenses and has no statutory right to challenge this issue on appeal. *See* N.C. Gen. Stat. § 15A-1444(a2) (2019). Defendant may, however, "petition the appellate division for review by writ of certiorari." *Id.* at § 15A-1444(e) (2019).

¶ 6 The State argues that this Court cannot grant Defendant's petition for writ of certiorari because our Rules of Appellate Procedure allow this Court to issue a writ of certiorari only where "the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C. [Gen. Stat. §] 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1). The State's argument has been rejected by our North Carolina Supreme Court. *See State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018); *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016); *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015).

¶ 7 The General Assembly has given this Court jurisdiction to issue a writ of certiorari "in aid of its own jurisdiction[.]" N.C. Gen. Stat.

§ 7A-32(c) (2019). "[W]hile Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution." *Stubbs*, 368 N.C. at 44, 770 S.E.2d at 76. Where, as here, "a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." *Ledbetter*, 371 N.C. at 196, 814 S.E.2d at 42 (quoting *Thomsen*, 369 N.C. at 27, 789 S.E.2d at 643). Accordingly, this Court has jurisdiction to grant Defendant's petition for writ of certiorari.

¶ 8 "A petition for the writ must show merit or that error was probably committed below. Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (2013) (quotation marks and citation omitted). As Defendant's petition shows merit and the consequences of the sentencing error are significant, we exercise our discretion for good and sufficient cause to grant the petition.

¶ 9 **[2]** Defendant contends that the "single taking rule" prevents him from being convicted for both larceny offenses because they were part of the same transaction at the same time and place. We agree.

¶ 10 "The 'single taking rule' prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction." *State v. Buchanan*, 262 N.C. App. 303, 306, 821 S.E.2d 890, 892 (2018) (citations omitted). "[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (quoting *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986)).

¶ 11 The State concedes that on the merits of Defendant's argument, Defendant is entitled to have judgment arrested on one larceny conviction because the larcenies were part of the same transaction. The State's evidence showed that Defendant took jewelry, a money clip, and a firearm from the same room of the victim's residence during the commission of a single breaking or entering on 9 November 2017. Thus, Defendant was improperly charged, convicted, and sentenced for both felony larceny of property pursuant to a breaking or entering and felony larceny of a firearm because the takings occurred at the same time and place as part of one continuous act. *See State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996) ("Although there was evidence of two enterings, the taking of the various items was all part of the same transaction. We arrest judgment on two of the convictions of larceny."). We remand

with instructions for the Superior Court to arrest judgment upon one of the larceny convictions.

B. Prior Record Level

¶ 12 **[3]** Defendant next contends that his sentence was based on an incorrect finding of his prior record level. Specifically, Defendant argues that the trial court miscalculated his prior record level by assigning one point for a prior conviction of possession of drug paraphernalia and one additional point based on prior convictions involving the same elements in three of his judgments.

¶ 13 Defendant is entitled to appeal as a matter of right whether his sentence was based on an incorrect finding of his prior record level. N.C. Gen. Stat. § 15A-1444(a2)(1). The determination of a defendant's prior record level is a conclusion of law that is subject to *de novo* review on appeal. *State v. McNeil*, 262 N.C. App. 340, 341, 821 S.E.2d 862, 863 (2018) (citation omitted).

1. Prior Conviction

¶ 14 A defendant's prior record level is determined by calculating the sum of the points assigned to each of the defendant's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2019). Convictions for Class 1 misdemeanors are assigned one point, while no points are assigned for Class 3 misdemeanor convictions. N.C. Gen. Stat. § 15A-1340.14(b)(5). When determining a defendant's prior record level, "the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c). The State has the burden of proving a defendant's prior convictions by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f).

¶ 15 The trial court assigned one point for a 7 June 2012 conviction for possession of drug paraphernalia. At the time of that conviction, the offense of possession of drug paraphernalia was a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 90-113.22 (2012). However, in 2014, possession of marijuana drug paraphernalia became a Class 3 misdemeanor. *See* N.C. Gen. Stat. § 90-113.22A (2017); *see also McNeil*, 262 N.C. App. at 342, 821 S.E.2d at 863-64 (discussing the legislative history of possession of drug paraphernalia). Accordingly, when Defendant committed the offenses in the case *sub judice* on 9 November 2017, possession of marijuana drug paraphernalia was a Class 3 misdemeanor for which no points could be assigned.

¶ 16 The State conceded to the trial court that Defendant's prior conviction was "a marijuana paraphernalia" and that "in light of the law today"

it would be a Class 3 misdemeanor.[1] The State failed to meet its burden of showing that Defendant's 2012 possession of drug paraphernalia conviction should be considered a Class 1 misdemeanor. *See McNeil*, 262 N.C. App. at 340, 821 S.E.2d at 863 ("Where the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor."). The trial court erred by assigning Defendant one prior point in all five judgments for his conviction of possession of drug paraphernalia.

2. All Elements in a Prior Offense

¶ 17 Defendant next argues that the trial court erred by assigning one additional point based on his prior convictions when it calculated his prior record level.

¶ 18 A trial court may add one point if "all the elements of the present offense are included in any prior offense." N.C. Gen. Stat. § 15A-1340.14(b)(6) (2019). Where a trial court uses the same felony prior record level worksheet to determine a defendant's prior record level for two or more sentences, the worksheet must accurately reflect the defendant's prior record level for each sentence. *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008).

¶ 19 In the present case, the trial court entered five separate judgments and used the same felony prior record level worksheet for each judgment. Defendant had fifteen prior convictions, including convictions for possession of a firearm by a felon and felony breaking or entering. The trial court gave Defendant an additional point because "all of the elements of the present offense are included in a prior offense[,]" pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6).

¶ 20 The trial court did not err by giving Defendant an additional point for the present offenses of possession of a firearm by a felon and felony breaking or entering. However, because the elements of the present offenses of larceny of a firearm, speeding to elude arrest, and robbery with a dangerous weapon are not included in any of his prior offenses, the trial court erred by assigning an additional felony record point for the judgments entered upon those convictions.

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1. Although the relevant inquiry is the classification of Defendant's prior conviction on 9 November 2017, the date the offense for which he was being sentenced was committed, rather than 11 December 2019, the date Defendant pled guilty, the relevant portions of N.C. Gen. Stat. §§ 90-113.22 and 90-113.22A were not altered or modified between these dates.

3. Prejudice

¶ 21 "This Court applies a harmless error analysis to improper calculations of prior record level points." *State v. Lindsey*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007) (citations omitted). If the trial court sentences a defendant under the proper record level, despite the improper calculation, the defendant suffers no prejudice and the error is harmless. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) ("[B]ecause defendant was correctly found to have nine prior record points, the erroneous finding of a tenth point based on his probationary status was harmless and defendant was correctly determined to have a prior record level of IV.").

¶ 22 Here, the trial court erroneously added one point to all five judgments based on Defendant's prior conviction for possession of drug paraphernalia. The trial court also erroneously added one point to Defendant's judgments for larceny of a firearm, speeding to elude arrest, and robbery with a dangerous weapon, because it improperly found that "all of the elements of the present offense are included in a prior offense." The combined effect of these two errors prejudiced Defendant because he should have been given thirteen prior record points and sentenced as a Level IV, instead of a Level V, for his convictions of felony larceny of a firearm, felony speeding to elude arrest, and felony robbery with a dangerous weapon. *See* N.C. Gen. Stat. § 15A-1340.14(c).[2] We remand those judgments for a new sentencing hearing.

III. Conclusion

¶ 23 We remand for the trial court to arrest judgment on either felony larceny pursuant to a breaking or entering or felony larceny of a firearm. We remand the convictions for felony larceny of a firearm (if judgment is not arrested), felony speeding to elude arrest, and felony robbery with a dangerous weapon for resentencing as a record level IV. We remand the conviction for felony breaking or entering for resentencing as it was consolidated with the felony larceny of a firearm conviction.

JUDGMENT ARRESTED IN PART AND REMANDED FOR RESENTENCING.

Judges DILLON and ZACHARY concur.

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2. The erroneous addition of one point in Defendant's judgments for possession of a firearm by a felon and felony breaking or entering was harmless because even when the erroneous point is subtracted, Defendant remains a Level V with fourteen prior record points. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5) ("Level V - At least 14, but no more than 17 points.")

STATE v. STEELE

[277 N.C. App. 124, 2021-NCCOA-148]

STATE OF NORTH CAROLINA
v.
JODY RAYE STEELE, DEFENDANT

No. COA20-171

Filed 20 April 2021

Search and Seizure—encounter with police officer—show of authority—in moving vehicles—use of hand gestures to seek communication

Defendant was seized for purposes of the Fourth Amendment when a marked police car followed his vehicle at 3:00 am into an empty parking lot, drew up to defendant's car so the driver's side windows of both vehicles were three to four feet apart, and the officer put his arm out the window and waved his hand up and down to indicate he wanted to speak with defendant. Under these circumstances, no reasonable person would feel free to leave, and defendant's motion to suppress evidence of his intoxication should have been granted.

Judge HAMPSON dissenting.

Appeal by Defendant from an order entered on 10 January 2020 and judgment entered on 25 October 2019 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nora F. Sullivan, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for the Defendant.

JACKSON, Judge.

¶ 1 The issue in this case is whether a driver is "seized" within the meaning of the Fourth Amendment when he is tailed by a marked police cruiser down empty streets at 3 a.m., followed into an empty parking lot, and then hailed down by the officer's hand gestures. Because we conclude that no reasonable person would believe he was free to go under such circumstances, we hold that Defendant was seized for purposes of the Fourth Amendment and that the trial court erred in denying his motion to suppress.

I. Factual and Procedural Background

¶ 2 Our only record of what occurred on the night of Defendant's arrest comes from the testimony of Officer Michael Plummer of the East Carolina University ("ECU") Police Department and a partial video of the stop. During the suppression hearing, Officer Plummer described his encounter with Defendant, which occurred in the early morning hours of 2 August 2017 while he was on patrol duty in Greenville, North Carolina. Officer Plummer was uniformed and driving in his patrol car that night, which had light strips and insignias identifying it as an ECU Police Department vehicle.

¶ 3 At 2:50 a.m., Officer Plummer received a dispatch advising that the county police were requesting assistance for a vehicle crash on Charles Boulevard, and began heading that way. As he was traveling south on Charles Boulevard, approaching the intersection of Charles and 14th Street, he noticed a yellow Camaro make a left turn from 14th Street and turn onto Charles heading south (the same direction he was heading in his cruiser). There was no other traffic on the road at that time—just the yellow Camaro, and Officer Plummer traveling behind it. He testified that he noticed that the Camaro "appeared to have its daytime running lights on" but that "no rear lights were illuminated."

¶ 4 Officer Plummer began following the Camaro as it proceeded south down Charles and made another left onto Ficklen Drive, at the same time radioing dispatch to ascertain whether or not the Camaro might have been involved in the accident. He continued following the Camaro down Ficklen Drive as it pulled into an on-campus parking lot. The parking lot was totally empty when the two vehicles arrived.

¶ 5 Once inside the parking lot, Officer Plummer observed the Camaro as it "made a u-turn" and began circling back towards the parking lot entrance. At that point, Officer Plummer approached the Camaro, driving toward it as the Camaro was headed the opposite direction out of the lot. Officer Plummer pulled up close enough that the cars were positioned "driver's door to driver's door," approximately three to four feet apart. As he was positioning his vehicle, Officer Plummer also rolled down his window and "stuck [his] hand out the car to flag [the driver of the Camaro] down." Specifically, Officer Plummer stated that he "rested [his] forearm on the door – on the window frame and waved [his] hand up and down." As he reached the driver's door of the Camaro and gestured, both vehicles "mutually came to a stop." At this point he had not activated his blue lights or siren.

¶ 6 Officer Plummer then began speaking with the driver to see "if he had possibly been through the area and seen anything in relation to the vehicle crash." After Defendant replied, Officer Plummer began to suspect that Defendant had been drinking. He then asked Defendant to get out of the vehicle, performed several field sobriety tests, and eventually arrested and cited Defendant for impaired driving.

¶ 7 On 2 March 2018, Defendant filed a motion to suppress in Pitt County District Court, challenging the stop of his vehicle as an unlawful seizure and detention. The district court ultimately denied his motion to suppress, and on 17 April 2019 he was found guilty of impaired driving and sentenced to twelve months of unsupervised probation in addition to a sixty-day suspended sentence. Defendant appealed the district court's judgment to Pitt County Superior Court on 18 April 2019. On 23 May 2019, Defendant filed a new motion to suppress in the superior court, again challenging the stop of his vehicle as an unlawful seizure and detention. The superior court heard arguments on Defendant's motion to suppress on 25 October 2019. Officer Plummer was the only witness who testified at the hearing.

¶ 8 At the conclusion of the hearing, the trial court determined that the encounter between Defendant and Officer Plummer was not a traffic stop, because Officer Plummer had not indicated to Defendant that he was not free to leave. The trial court accordingly denied Defendant's motion to suppress. Defense counsel then announced Defendant's intent (which had been previously communicated to the State) to enter a guilty plea following the denial of his motion to suppress. Defendant subsequently pleaded guilty to driving while impaired. The trial court again imposed a suspended sixty-day sentence and placed Defendant on unsupervised probation for twelve months.

¶ 9 Defendant gave oral notice of appeal in open court and filed a written notice of appeal with this Court on 4 November 2019. On 10 January 2020, the trial court entered a written order denying Defendant's motion to suppress that included the following pertinent Findings of Fact:

> 4. That Officer Plummer saw the Defendant's vehicle and observed that the Defendant's vehicle appeared to have its daytime running lights on for the headlights, but the rear lights were not illuminated.
>
> 5. That the lack of illuminated rear lights on the Defendant's vehicle drew Officer Plummer's attention to the vehicle.
>
> . . . .

13. That after Officer Plummer followed the Defendant's vehicle into the parking lot, the Defendant's vehicle made a U-turn and began traveling towards Officer Plummer's vehicle.

14. That Officer Plummer drove driver's door to driver's door with the Defendant's vehicle, with Officer Plummer's vehicle facing the opposite direction as the Defendant's vehicle.

15. That as Officer Plummer pulled alongside the Defendant's vehicle, Officer Plummer extended his hand out of his driver's window, rested his forearm on his driver's door, and waved his hand up and down.

16. That Officer Plummer testified that his intention was to engage in a voluntary consensual conversation with the Defendant.

17. That as Officer Plummer reached the driver's door of the Defendant's vehicle, both vehicles came to a stop and the Defendant rolled down his window.

. . .

19. That Officer Plummer was approximately three to four feet away from the Defendant as they spoke.

20. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, no other officers or patrol vehicles were on scene.

21. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not engaged his blue lights or siren.

22. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not positioned his patrol vehicle in a manner that would obstruct the Defendant's vehicle from exiting the parking lot nor restrict his movement in any way.

23. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not directed the Defendant to

> get out of the Defendant's vehicle nor restricted the Defendant's freedom of movement in any way.
>
> 24. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not indicated to the Defendant that the Defendant was in custody or that the Defendant was not free to leave.
>
> 25. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not exited his patrol vehicle, taken any enforcement action, given any orders or commands to the Defendant, nor displayed any weapon or demonstrated any other show of authority to indicate that this was a traffic stop.
>
> 26. That during the conversation with the Defendant, Officer Plummer observed factors that ultimately led Officer Plummer to investigate and arrest the Defendant for Driving While Impaired.

Based on these findings, the trial court concluded as a matter of law:

> 4. That pursuant to *State v. Wilson*, this Court has considered the factors that Officer Plummer was alone when he encountered the Defendant, that Officer Plummer did not draw his weapon, that Officer Plummer did not activate his lights or siren on his patrol car, that Officer Plummer did not do or say anything to indicate to the Defendant that the Defendant was required to stop, and that the Defendant was in the Defendant's own vehicle and could have driven around Officer Plummer's patrol car.
>
> 5. That Officer Plummer had not initiated a traffic stop at the time of his conversation with the Defendant.
>
> 6. That Officer Plummer's conversation with the Defendant was a voluntary, consensual conversation between Officer Plummer and the Defendant at a time when the Defendant's freedom of movement was not restricted, and Officer Plummer had made no show of authority to indicate that the interaction was a traffic stop or that the Defendant was under arrest.

7. That the Defendant was not seized under the Fourth Amendment when he voluntarily stopped his own vehicle in the parking lot next to Officer Plummer's patrol vehicle and began conversing with Officer Plummer.

II. Analysis

A. Standard of Review

¶ 10 On appeal of an order denying a motion to suppress, we conduct a two-part review: (1) to determine whether there is "competent evidence" to support the trial court's findings of fact, and (2) to determine whether "those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). If the findings of fact are supported by substantial competent evidence, then they are binding on appeal. *State v. Gabriel*, 192 N.C. App. 517, 519, 665 S.E.2d 581, 584 (2008). However, the trial court's conclusions of law are reviewed de novo. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007).

B. Challenged Findings of Fact

¶ 11 Defendant raises several challenges to the findings of fact contained in the trial court's order. Defendant first challenges Finding of Fact 16, which states that "Officer Plummer testified that his intention was to engage in a voluntary consensual conversation with the Defendant." Defendant contends that this is not a proper finding of fact because it does nothing more than recite the testimony of a witness. We agree.

¶ 12 As our Supreme Court has previously held, although "recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). In other words, when there is a material conflict in the evidence regarding a certain issue, it is improper for the trial court to make findings which "do not resolve conflicts in the evidence but are merely statements of what a particular witness said." *Id. See also Huffman v. Moore Cty.*, 194 N.C. App. 352, 359, 669 S.E.2d 788, 792-93 (2008) (holding that factual findings are improper when they "merely recite or summarize witness testimony" but do not actually state what the court "finds the facts to be").

¶ 13 Here, there was a material conflict in the evidence regarding whether or not Officer Plummer's encounter with Defendant was a "voluntary consensual conversation" or was instead a traffic stop—in fact, this is the primary issue of contention in this case as a whole. Officer Plummer

maintains that his flagging down of Defendant in the parking lot was a non-coerced, consensual encounter; while Defendant maintains that any reasonable person would realize that this was a compulsory traffic stop. Accordingly, due to this material conflict it was improper for the trial court to make findings that simply summarized the testimony of Officer Plummer on this key issue. We hold that Finding of Fact 16 does not support the trial court's conclusions of law because it does not resolve a material conflict in the evidence.

¶ 14 Defendant also challenges Findings of Fact 24 and 25, which provide as follows:

> 24. That at the time the Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not indicated to the Defendant that the Defendant was in custody or that the Defendant was not free to leave.
>
> 25. That at the time the Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not exited his patrol vehicle, taken any enforcement action, given any orders or commands to the Defendant, nor displayed any weapon or demonstrated any other show of authority to indicate that this was a traffic stop.

¶ 15 We agree with Defendant that these two factual findings are improper because they are in reality mislabeled conclusions of law. As we have previously explained, any finding which requires "the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." *Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) (internal marks and citation omitted). Consequently, "[a] finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal"—and will be subjected to de novo review. *Id.*

¶ 16 Here, findings 24 and 25 encompass two important conclusions of law—namely, whether or not Officer Plummer had indicated to Defendant that he was free to leave; and whether or not Officer Plummer had made a show of authority to indicate that this was a traffic stop. Both of these conclusions involve the exercise of judgment and the application of legal principles under the Fourth Amendment. Thus, findings 24 and 25 must be treated as conclusions of law and subjected to de novo review. Accordingly, we review these two findings in the subsequent section of this opinion, together with the trial court's other conclusions of law.

¶ 17 Finally, Defendant challenges a set of findings involving the operation of his vehicle's headlights. Specifically, Findings of Fact 4 and 5 provide:

> 4. That Officer Plummer saw the Defendant's vehicle and observed that the Defendant's vehicle appeared to have its daytime running lights on for the headlights, but the rear lights were not illuminated.
>
> 5. That the lack of illuminated rear lights on the Defendant's vehicle drew Officer Plummer's attention to the vehicle.

¶ 18 Defendant asserts that these findings are both inaccurate because the record contains irrefutable evidence contradicting Officer Plummer's testimony that the Camaro had no functioning rear lights. Most notably, Defendant points to the fact that the Camaro was a new vehicle with automatic lights; and the video footage of his arrest which shows that the Camaro's headlights and rear lights were illuminated as soon as the vehicle was turned on.

¶ 19 Though we are inclined to agree with Defendant that findings 4 and 5 are unsupported by the record, ultimately there is no need to analyze these findings because they are not dispositive to the question of whether Defendant was seized at the relevant time within the meaning of the Fourth Amendment. The issue of whether Defendant's taillights were illuminated is irrelevant because the trial court's ruling did not turn on whether Officer Plummer had reasonable suspicion to pull over Defendant for a traffic stop. Instead, as explained below, the dispositive issue is whether this encounter qualified as a traffic stop at all (as opposed to a voluntary encounter which did not implicate the Fourth Amendment).

C. Challenged Conclusions of Law—Motion to Suppress

¶ 20 Defendant argues that the trial court erred in denying his motion to suppress, contending that the traffic stop initiated by Officer Plummer was an unreasonable seizure under the Fourth Amendment. The trial court made the following conclusions of law in determining that Defendant was not seized by Officer Plummer under the Fourth Amendment:

> 2. That the only matter before this Court is whether the Defendant was seized under the Fourth Amendment when he voluntarily stopped his own vehicle in the parking lot next to Officer Plummer's

patrol vehicle and began conversing with Officer Plummer; and if so, whether the seizure was lawful.

3. That the Court has reviewed and considered *State v. Wilson*, 793 S.E.2d 737 (2016), in making its findings and conclusions.

4. That pursuant to *State v. Wilson*, this Court has considered the factors that Officer Plummer was alone when he encountered the Defendant, that Officer Plummer did not draw his weapon, that Officer Plummer did not activate his lights or siren on his patrol car, that Officer Plummer did not do or say anything to indicate to the Defendant that the Defendant was required to stop, and that the Defendant was in the Defendant's own vehicle and could have driven around Officer Plummer's patrol car.

5. That Officer Plummer had not initiated a traffic stop at the time of his conversation with the Defendant.

6. That Officer Plummer's conversation with the Defendant was a voluntary, consensual conversation between Officer Plummer and the Defendant at a time when the Defendant's freedom of movement was not restricted, and Officer Plummer had made no show of authority to indicate that the interaction was a traffic stop or that the Defendant was under arrest.

7. That the Defendant was not seized under the Fourth Amendment when he voluntarily stopped his own vehicle in the parking lot next to Officer Plummer's patrol vehicle and began conversing with Officer Plummer.

¶ 21 Ultimately, we agree with Defendant that the trial court erred in concluding that the encounter between himself and Officer Plummer was not a seizure under the Fourth Amendment. The Fourth Amendment of the United States Constitution protects "the right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend IV. Article I, § 20 of the North Carolina Constitution likewise "protect[s] against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012). "Fourth Amendment rights are enforced primarily through 'the exclusionary rule,' which provides that evidence

derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

¶ 22 It is well-established that "a traffic stop is considered a 'seizure' within the meaning of" both the federal and state constitutions, and that a traffic stop is only constitutional if supported by reasonable suspicion. *Otto*, 366 N.C. at 136-37, 726 S.E.2d at 827. However, the issue in this case is not whether Officer Plummer had reasonable suspicion to stop Defendant—rather, the issue is whether the encounter between Defendant and Officer Plummer was a traffic stop (i.e., a seizure) at all.

¶ 23 Not every interaction between citizens and law enforcement constitutes a seizure. The United States Supreme Court has "repeatedly held that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). *See also State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (internal marks and citation omitted) (explaining that "communication between the police and citizens involving no coercion or detention" does not constitute a seizure). Thus, officers do not violate the Fourth Amendment "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (internal marks and citation omitted).

¶ 24 In contrast, a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 20 n. 16 (1968). *See also State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58 (1995) ("A seizure does not occur until there is a physical application of force or submission to a show of authority."). Here, Defendant is not contending that Officer Plummer used a physical application of force to stop his vehicle—but rather that Officer Plummer made a show of authority which compelled him to stop.

¶ 25 A show of authority constitutes a seizure when "under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586. *See also Bostick*, 501 U.S. at 437 (a show of authority occurs when the officer's conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business") (internal marks and citation omitted). When a sufficient show of authority is made, it is possible for an officer to seize a person without ever laying hands

on that person. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991) (noting that when there is "an assertion of authority" by an officer, "no actual, physical touching is essential" for the encounter to qualify as a seizure) (internal marks and citation omitted).

¶ 26 In determining whether a show of authority has occurred, relevant circumstances include "the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009). What constitutes a seizure "will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

¶ 27 The present case is somewhat unique in that Defendant was hailed by Officer Plummer while they were both driving in separate vehicles, as opposed to walking down the street. Seizure cases most typically involve a defendant who is approached by an officer on foot while in a public location. *See*, *e.g.*, *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586 (no seizure when defendant was seated in a parked, open-door vehicle in a public parking lot and approached by an officer on foot); *Isenhour*, 194 N.C. App. at 544, 670 S.E.2d at 268 (no seizure when defendant was seated in a parked vehicle in a public parking lot and officers approached the car on foot). We are unable to find any caselaw in this state specifically addressing whether a seizure occurs when an officer hails down an individual while both are piloting moving vehicles.

¶ 28 However, the trial court (as well as the dissenting opinion in this case) ignored this key distinction in its analysis and instead relied exclusively on cases involving on-foot encounters. For example, the dissent first discusses *Brooks*, wherein we held that no seizure occurred when the defendant was approached by officer on foot while the defendant was seated in a parked, open-door vehicle in a public parking lot. 337 N.C. at 137, 446 S.E.2d at 583. The officer greeted the defendant and, after spying an empty holster in the car, asked defendant where the gun was, leading to a search of the car and the defendant's arrest. *Id.*

¶ 29 The dissent similarly relies on *Williams*, wherein an officer began following a vehicle in his patrol car because he suspected the vehicle's 30-day tag was expired. *State v. Williams*, 201 N.C. App. 566, 567, 686 S.E.2d 905, 906 (2009). As the officer ran the tag in his computer, he noticed the defendant pull into a driveway. *Id.* The officer pulled over

to the curb on the opposite side of the street, approached the vehicle, and inquired with the defendant about the status of his 30-day tag. *Id.* We held that this was not a seizure, because the officer "did not initiate a traffic stop," and the defendant "did not pull into the driveway as a result of any show of authority from" the officer. *Id.* at 570, 686 S.E.2d at 908. We noted that the officer approached on foot, that he "did not physically block Defendant's vehicle from leaving the scene," that he did not activate his sirens or lights, and that he did not use "any language or . . . demeanor suggesting that Defendant was not free to leave." *Id.* at 571, 686 S.E.2d at 909.

¶ 30 Finally, the trial court relied heavily on *Wilson*, wherein an officer parked his patrol car across the street from a residence after receiving a tip that a wanted suspect would be there. *State v. Wilson*, 250 N.C. App. 781, 782, 793 S.E.2d 737, 738 (2016), *aff'd per curiam*, 370 N.C. 389, 808 S.E.2d 266 (2017). As the officer parked, he saw a pickup truck beginning to exit the driveway of the residence, and he walked over intending to speak to the driver, while he "waved his hands back and forth just above shoulder level to tell [the defendant] to stop the vehicle." *Id.* We held that this did not constitute a seizure, noting that (1) the officer "did not approach [the defendant] in a confined space"; (2) the defendant's "movement was not restricted" given that the defendant "was in a truck while Officer Johnson was on foot"; (3) "Officer Johnson was alone on the scene, he did not draw his weapon, and his lights and sirens were off"; and (4) the officer "did not touch [the defendant] or use any language or tone which would indicate that compliance with his request would be compelled." *Id.* at 785-86, 793 S.E.2d at 741.

¶ 31 There are several key differences between the present case and these three cases: (1) the fact that this encounter involved two moving vehicles; (2) the time and location of the encounter; and (3) Officer Plummer's use of authoritative gestures to hail down Defendant's vehicle.

¶ 32 First and most notably, Defendant here was followed and hailed by Officer Plummer while both were driving in moving motor vehicles—unlike in *Brooks*, *Williams*, and *Wilson*, where an officer approached a stationary vehicle on foot. There is an important legal distinction between an officer who tails and waves down a moving vehicle in his patrol car; and an officer who walks up to a stationary vehicle on foot. In the latter scenario, the officer has taken no actions to impede the movement of the defendant—whereas in the former scenario, the officer's show of authority has obligated the defendant to halt the movement of his vehicle in order to converse with the officer. As the United States Supreme Court has previously explained, "stopping or diverting an automobile in tran-

sit, with the attendant opportunity for a visual inspection of areas of the [vehicle] not otherwise observable, is *materially more intrusive* than a question put to a passing pedestrian." *United States v. Mendenhall*, 446 U.S. 544, 556-57 (1980) (emphasis added).

¶ 33 Moreover, a reasonable motorist would surely feel less at liberty to "ignore the police presence and go about his business" when waved down by an officer in a moving patrol car. *Bostick*, 501 U.S. at 437. In fact, in such a situation most people would feel compelled to slow down and speak with the officer, knowing that ignoring the request would only end in trouble.

¶ 34 This becomes especially apparent when one examines the criminal consequences that might follow when a person ignores an officer's request in such a scenario. For example, N.C. Gen. Stat. § 20-114.1(a) makes it unlawful for any person to "willfully fail or refuse to comply with any lawful order or direction of any law-enforcement officer[,] . . . which order or direction related to the control of traffic." N.C. Gen. Stat. § 20-114.1(a) (2019). We have previously upheld a conviction under this statute when a defendant ignored an officer's request to drive in a certain lane as the officer was directing traffic. *See State v. Satterfield*, 166 N.C. App. 282, 603 S.E.2d 167, 2004 WL 1964874, at *1-2 (2004) (unpublished).

¶ 35 Similarly, N.C. Gen. Stat. § 14-223 makes it unlawful to "willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-223 (2019). We have previously upheld a conviction under this statute when officers approached a defendant in his improperly stopped vehicle, but the defendant wouldn't roll down his window, refused to speak with them, and acted uncooperatively. *See State v. Hoque*, 269 N.C. App. 347, 349-50, 837 S.E.2d 464, 468-69 (2020).

¶ 36 These cases illustrate that a person in Defendant's situation finds himself caught in a Catch-22—comply with the officer's requests, and relinquish your Fourth Amendment rights; or ignore the officer's requests, and be arrested for resisting a public officer. This cannot be consistent with the guarantees in the Fourth Amendment and Article I, § 20 of the North Carolina Constitution. We conclude that when a person would likely face criminal charges for failing to comply with an officer's "request," then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution.

¶ 37 In addition to erroneously ignoring the inherently coercive nature of an officer hailing down a moving vehicle while in a marked patrol car, the trial court's analysis failed to adequately account for the time

and location of this encounter. *See Icard*, 363 N.C. at 309, 677 S.E.2d at 827 (holding that the location and physical circumstances of the encounter are relevant seizure factors). Here, Officer Plummer first spotted Defendant's vehicle on an otherwise empty street at around three in the morning. He then tailed Defendant as Defendant proceeded down Charles Boulevard for some time, made two different left turns, and then entered a campus parking lot—a large paved lot that was completely empty. A reasonable person would find such an empty, isolated location at such a late time of night to be intimidating, and would be more susceptible to police pressure which he or she otherwise might have felt free to ignore in a sunlit, crowded location.

¶ 38 Finally, the trial court overlooked the authoritative physical gestures made by Officer Plummer indicating that he wished Defendant to stop and speak with him. Authoritative gestures made by an officer (or the lack thereof) can be a significant factor in determining whether or not a seizure occurred. *See*, *e.g.*, *State v. Wilson*, 198 N.C. App. 406, 681 S.E.2d 565, 2009 WL 2177694, at *3 (2009) (unpublished) (holding that no seizure had occurred when the officers "made no gestures that Defendant could have reasonably interpreted as an order to stop" as they approached his car); *State v. Hazel*, 262 N.C. App. 373, 820 S.E.2d 132, 2018 WL 5796274, at *6 (2018) (unpublished) (holding that no seizure had occurred when the officer did not "make any authoritative gestures or commands" as he parked his car near the defendant's and asked to speak with him). Moreover, Officer Plummer was uniformed, presumably carrying a weapon, and was driving in his clearly-marked patrol vehicle. *See State v. Knudsen*, 229 N.C. App. 271, 282, 747 S.E.2d 641, 649 (2013) ("Several North Carolina Supreme Court opinions have also found the fact that an officer was in uniform to be a significant factor to consider when determining whether a seizure has occurred.").

¶ 39 In sum, when one examines all the attendant circumstances surrounding this encounter, the only reasonable conclusion is that Defendant was seized by Officer Plummer—especially when one examines this encounter from Defendant's perspective. Around 3:00 in the morning on 2 August 2017, Defendant was driving down Charles Boulevard when a police cruiser pulled up directly behind him and began tailing him down the street. The street was completely empty aside from these two vehicles. The cruiser continued to follow directly behind him as he turned left onto Ficklen Drive, and then made another turn into a campus parking lot. Even at this early point in the encounter, after being tailed by a police car down empty streets into an empty parking lot, any reasonable person would have realized that they are the target of police suspicion and are likely to be imminently pulled over.

¶ 40 The intimidating nature of this encounter was further amplified once the two vehicles reached the deserted parking lot. As Defendant made a U-turn and attempted to leave the parking lot, the patrol car rolled down its window, and the officer waved his hands in a clear indication that he wished Defendant to stop. Defendant slowed, and the patrol car pulled up right next to him, such that the two drivers were facing each other, only three to four feet apart.

¶ 41 Thus, it is evident that Defendant stopped his vehicle's motion in direct response to Officer Plummer's authoritative conduct and commanding gestures. This becomes especially apparent when one considers how a reasonable person would have reacted if a *non-police* vehicle had followed them down public streets into an empty parking lot at 3 a.m. and then gestured for them to stop. No reasonable person would likely comply with such a request coming from a stranger—making it even more apparent that the only reason Defendant stopped here was due to Officer Plummer's display of authority.

¶ 42 Moreover, although the subjective point of view of the officer is not by itself a dispositive factor in the seizure analysis, we cannot wholly ignore the telling descriptions of this encounter which were provided by Officer Plummer himself. Officer Plummer testified that his purpose in waving down the Camaro was to get the driver to comply with his directive and stop so that he could speak with him. Moreover, in Officer Plummer's written field report of this encounter (which he prepared that day), he expressly described his meeting with Defendant as a "traffic stop." Defendant's statements during the encounter (as shown by the video) indicate that he too considered this encounter to be a non-consensual traffic stop—repeatedly asking Officer Plummer "what did I get pulled over for?"

III. Conclusion

¶ 43 Thus, after examining all the attendant facts and circumstances, we conclude that no reasonable person in Defendant's position would have felt free to ignore Officer Plummer's show of authority. Accordingly, we hold that Defendant was seized within the meaning of the Fourth Amendment and Article I, § 20 of the North Carolina Constitution, and that the trial court erred in denying Defendant's motion to suppress. We reverse the trial court's order denying the motion to suppress and remand back to the trial court for a new determination on whether Officer Plummer possessed reasonable suspicion to conduct this traffic stop.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 44 The majority correctly identifies the issue that was before the trial court. The issue before this Court on appeal, however, is whether the trial court's Findings of Fact are supported by competent evidence in the Record and whether those Findings support its Conclusions of law. Because the trial court's Findings are supported by evidence and, consistent with our existing jurisprudence, in turn support the trial court's Conclusions of law, I would affirm the trial court. Accordingly, I dissent.

I. Factual and Procedural Background

¶ 45 Defendant was arrested and cited for Driving While Impaired on 2 August 2017. On 17 April 2019, Defendant was found guilty of Driving While Impaired in Pitt County District Court and received a sixty-day sentence suspended upon his completion of twelve months of unsupervised probation.

¶ 46 Defendant appealed the District Court's Judgment to the Superior Court on 18 April 2019. On 23 May 2019, Defendant filed a Motion to Suppress in Superior Court arguing the evidence against him was the result of an unlawful traffic stop and seizure. The trial court heard Defendant's Motion to Suppress on 25 October 2019. Officer Michael Plummer (Officer Plummer), of the East Carolina University Police Department, was the only witness who testified at the hearing.

¶ 47 Officer Plummer testified that on 2 August 2017, at approximately 2:50 a.m., he was driving his marked patrol vehicle on East 10th Street in Greenville, North Carolina. At that time, Officer Plummer received a call from dispatch requesting assistance with a vehicle crash on Charles Boulevard. Officer Plummer stated, as he approached the intersection of 14th Street and Charles Boulevard, he saw a yellow Camaro turn left from 14th Street onto Charles Boulevard. Officer Plummer followed the yellow Camaro which, according to Officer Plummer, "appeared to have its daytime running lights on for the headlights but no rear lights were illuminated." Officer Plummer testified the Camaro turned left onto Ficklen Drive and then turned right into a large parking lot—with Officer Plummer following.

¶ 48 Officer Plummer stated the Camaro executed a "u-turn and was coming back" towards Officer Plummer's vehicle in the parking lot. Officer Plummer testified the parking lot was empty except for the Camaro and Officer Plummer's patrol vehicle. Officer Plummer drove toward the approaching Camaro and positioned his patrol vehicle such that the driver's sides of both vehicles were parallel to one another. Officer Plummer, in uniform at the time, rolled down his driver's window and "rested [his] forearm on the door — on the window frame and waved [his] hand up and down" in order to get the Camaro to stop. Officer Plummer testified he had not activated his blue lights or sirens, nor given any verbal commands to the driver of the Camaro at any point prior to Officer Plummer waving his hand.

¶ 49 The Camaro came to a stop with the driver's windows of both vehicles near and facing each other. According to Officer Plummer, the vehicles were "[t]hree to four feet" apart. Officer Plummer explained he "began speaking with the driver to see if he had possibly been through the area and seen anything in relation to the vehicle crash that [police] were responding to." During the hearing, Officer Plummer identified Defendant as the driver of the Camaro. Officer Plummer testified he had not indicated to Defendant that Defendant was not free to leave nor did he block Defendant from leaving the parking lot. According to Officer Plummer, at the time he initiated his conversation with Defendant, there were no other officers present.

¶ 50 At the hearing, defense counsel played video recorded by Officer Plummer's dashboard camera during Officer Plummer's encounter with Defendant. This video begins when Defendant's and Officer Plummer's vehicles are already stopped and after Officer Plummer had asked Defendant if he had seen the earlier accident. The first verbal exchange the video depicts is Officer Plummer asking Defendant "how much have you had to drink?" Defendant replied he had consumed "a couple beers." After Officer Plummer clarified what Defendant meant by "a couple beers," he told Defendant to "hold tight for me real quick" and immediately pulled his patrol vehicle behind Defendant's. Officer Plummer got out of his patrol vehicle and approached Defendant's driver's door. Officer Plummer asked Defendant to get out of the Camaro and walk back between the Camaro and Officer Plummer's patrol vehicle. Officer Plummer asked if Defendant would submit to a breathalyzer test. Defendant refused. Officer Plummer commenced a field sobriety test by asking Defendant to perform certain tasks, including following Officer Plummer's hand with Defendant's eyes.

¶ 51 Eventually, another officer arrived on scene to assist Officer Plummer. Defendant was placed in custody and taken to the rear seat of Officer Plummer's patrol vehicle. Defendant asked: "What did I get pulled over for?" Officer Plummer replied: "So first of all, I saw you driving without your headlights on." Officer Plummer also told Defendant that Officer Plummer noticed Defendant had slurred speech and dilated eyes when Officer Plummer spoke with Defendant about the earlier crash. Later in the video, another officer tells Officer Plummer that the Camaro's headlights came on as soon as the other officer turned the car on in order to move it into a parking space. Officer Plummer replied that he had seen the Camaro moving without its rear lights operating.

¶ 52 Following arguments on the Motion to Suppress, the trial court made several oral Findings and denied Defendant's Motion. Defense counsel then announced Defendant's intent—previously communicated to the State—to enter a guilty plea following the denial of his Motion to Suppress and subsequently notice his appeal. Defendant subsequently entered a guilty plea to Driving While Impaired, as memorialized in a Transcript of Plea, which indicated his plea was entered after the Motion to Suppress was denied and reserving Defendant's right to appeal the trial court's denial of his Motion to Suppress. The trial court again imposed a suspended sixty-day sentence and placed Defendant on unsupervised probation for twelve months.

¶ 53 Defendant gave oral Notice of Appeal in open court and subsequently filed written Notice of Appeal from the trial court's denial of Defendant's Motion to Suppress and resulting 25 October 2019 Judgment to this Court on 4 November 2019. On 10 January 2020, the trial court filed a written Order denying Defendant's Motion to Suppress that included the following, pertinent Findings of Fact:

> 4. That Officer Plummer saw the Defendant's vehicle and observed that the Defendant's vehicle appeared to have its daytime running lights on for the headlights, but the rear lights were not illuminated.
>
> 5. That the lack of illuminated rear lights on the Defendant's vehicle drew Officer Plummer's attention to the vehicle.
>
> . . . .
>
> 13. That after Officer Plummer followed the Defendant's vehicle into the parling lot, the Defendant's vehicle made a U-turn and began traveling towards Officer Plummer's vehicle.

14. That Officer Plummer drove driver's door to driver's door with the Defendant's vehicle, with Officer Plummer's vehicle facing the opposite direction as the Defendant's vehicle.

15. That as Officer Plummer pulled alongside the Defendant's vehicle, Officer Plummer extended his hand out of his driver's window, rested his forearm on his driver's door, and waved his hand up and down.

16. That Officer Plummer testified that his intention was to engage in a voluntary consensual conversation with the Defendant.

. . . .

18. That Officer Plummer began speaking with the Defendant to see if the Defendant had been through the area and witnessed the vehicle crash on Charles Blvd.

19. That Officer Plummer was approximately three to four feet away from the Defendant as they spoke.

20. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, no other officers or patrol vehicles were on scene.

21. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not engaged his blue lights or siren.

22. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not positioned his patrol vehicle in a manner that would obstruct the Defendant's vehicle from exiting the parking lot nor restrict his movement in any way.

23. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not directed the Defendant to get out of the Defendant's vehicle nor restricted the Defendant's freedom of movement in any way.

24. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not indicated to the Defendant that the Defendant was in custody or that the Defendant was not free to leave.

25. That at the time Defendant stopped his vehicle and engaged in a conversation with Officer Plummer, Officer Plummer had not exited his patrol vehicle, taken any enforcement action, given any orders or commands to the Defendant, nor displayed any weapon or demonstrated any other show of authority to indicate that this was a traffic stop.

26. That during the conversation with the Defendant, Officer Plummer observed factors that ultimately led Officer Plummer to investigate and arrest the Defendant for Driving While Impaired.

¶ 54 Based on these Findings, the trial court concluded:

4. That pursuant to State v. Wilson, this Court has considered the factors that Officer Plummer was alone when he encountered the Defendant, that Officer Plummer did not draw his weapon, that Officer Plummer did not activate his lights or siren on his patrol car, that Officer Plummer did not do or say anything to indicate to the Defendant that the Defendant was required to stop, and that the Defendant was in the Defendant's own vehicle and could have driven around Officer Plummer's patrol car.

5. That Officer Plummer had not initiated a traffic stop at the time of his conversation with the Defendant.

6. That Officer Plummer's conversation with the defendant was a voluntary, consensual conversation between Officer Plummer and the Defendant at a time when the Defendant's freedom of movement was not restricted, and Officer Plummer had made no show of authority to indicate that the interaction was a traffic stop or that the Defendant was under arrest.

7. That the Defendant was not seized under the Fourth Amendment when he voluntarily stopped his own vehicle in the parking lot next to Officer

Plummer's patrol vehicle and began conversing with Officer Plummer.

II. Appellate Jurisdiction

¶ 55 "An order . . . denying a motion to suppress evidence may be reviewed upon an appeal from . . . a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2019). However, a defendant must (1) notify the prosecutor and the trial court of his intention to appeal during plea negotiations and (2) provide notice of appeal from the final judgment. *State v. McBride*, 120 N.C. App. 623, 625-26, 463 S.E.2d 403, 404-05 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

¶ 56 Here, the Record, including discussion with the trial court and the Transcript of Plea memorializing Defendant's guilty plea arrangement, reflects Defendant gave timely notice to both the State and the trial court of his intention to appeal prior to the plea being finalized. *See id.*, 463 S.E.2d at 405 (citations and quotation marks omitted). Moreover, Defendant's timely filed written Notice of Appeal also satisfies our jurisdictional requirement by memorializing his Notice of Appeal of the *Judgment* in this action. *Cf. State v. Miller*, 205 N.C. App. 724, 725-26, 696 S.E.2d 542, 542-43 (2010) (dismissing a defendant's appeal for lack of jurisdiction where defendant gave notice of appeal from the denial of his motion to suppress but not from his *judgment* of conviction). Therefore, Defendant's appeal is properly before this Court.

III. Analysis

¶ 57 "Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" N.C. Gen. Stat. § 15A-974(a) (2019). The Fourth Amendment to the United States Constitution protects an individual's right to be free from unreasonable seizures. U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures . . . ." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016). Therefore, evidence obtained as the result of an unreasonable seizure must be suppressed upon timely motion.

¶ 58 "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citations omitted). "Our review of a trial court's denial of a motion to suppress

is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citations and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

A. The Trial Court's Findings

¶ 59 At the heart of Defendant's arguments both before the trial court and on appeal is his contention his encounter with Officer Plummer was not a voluntary conversation about a purported traffic accident, but rather an investigatory stop—and, thus, a seizure—based on a pretext that Defendant was driving the Camaro without lights on. Defendant contends the evidence affirmatively establishes he was stopped on a pretext based on Officer Plummer's allegedly inconsistent statements as to whether and which lights were on and the dashcam footage taken after Defendant was detained by Officer Plummer showing: (a) the Camaro's lights were on when another officer moved the car, (b) that officer remarking that the lights came on automatically, and (c) Officer Plummer responding to Defendant's inquiry as to why he was stopped by noting "so, first of all, I saw you driving without your headlights on."

¶ 60 Thus, Defendant first challenges the trial court's Findings 4 and 5:

> 4. That Officer Plummer saw the Defendant's vehicle and observed that the Defendant's vehicle appeared to have its daytime running lights on for the headlights, but the rear lights were not illuminated.
>
> 5. That the lack of illuminated rear lights on the Defendant's vehicle drew Officer Plummer's attention to the vehicle.

¶ 61 Defendant argues Officer Plummer's statements during the encounter with Defendant, in his subsequent report, and testimony before the trial court are "materially inconsistent" and directly contradicted by the dashcam footage along with Defendant's supporting affidavit indicating the rented Camaro was equipped with automatic lights which were operable at the time Defendant rented the Camaro. The video evidence of the encounter, however, begins *after* Officer Plummer and Defendant

had stopped and had already begun conversing with one another, and, thus, does not capture Officer Plummer first observing the Camaro. As such, while the video evidence may well have some tendency to contradict Officer Plummer's testimony, at most it creates inconsistency in the evidence. This contradictory evidence and the evidence of the Camaro's automatic light feature and Officer Plummer's allegedly inconsistent statements may well, in turn, tend to bear on the credibility and weight to be given to Officer Plummer's testimony he first observed the Camaro being driven at night with no lights on. Nevertheless, it is the role of the trial court—and not this Court—to weigh testimony and resolve inconsistencies in the evidence. *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000) ("[A] trial court's resolution of a conflict in the evidence will not be disturbed on appeal[.]"); *Johnston*, 115 N.C. App. at 713, 446 S.E.2d at 137 ("the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence").

¶ 62 Here, the trial court weighed the evidence and resolved the conflict in the evidence in favor of the State. Thus, there is evidence—in the form of Officer Plummer's testimony—to support the trial court's Findings 4 and 5. Moreover, ultimately, these Findings were not dispositive to the trial court's conclusion Officer Plummer did not initially seize Defendant when Defendant stopped to talk with Officer Plummer in the parking lot because the trial court's ruling did not turn on whether Officer Plummer had reasonable suspicion to conduct an investigatory stop.

B. Voluntary Encounter

¶ 63 Rather, the trial court concluded the encounter between Defendant and Officer Plummer was voluntary. Therefore, the inquiry turns to whether the trial court's Findings support this conclusion. Specifically, Defendant argues Officer Plummer seized Defendant, for Fourth Amendment purposes, because Officer Plummer waved at Defendant to stop, constituting a show of authority to which Defendant acquiesced. Defendant further contends because Officer Plummer did not have probable cause or reasonable suspicion to seize Defendant initially, the stop violated his rights under the Fourth Amendment, and the trial court should have suppressed the evidence obtained as a result of an unreasonable seizure.

¶ 64 Here, relevant to the issue of whether the initial encounter was a stop for Fourth Amendment purposes, the trial court found: Officer Plummer "pulled alongside" Defendant's vehicle, rested his arm on his driver's window frame, and waved his hand up and down; Officer Plummer was "three to four" feet away from Defendant as they were speaking; Officer

Plummer began speaking with Defendant to see if Defendant had witnessed the earlier crash; no other officers were initially at the scene; that when Defendant stopped and spoke with Officer Plummer, Officer Plummer had not engaged his blue lights or siren; Officer Plummer had not obstructed Defendant's vehicle from leaving the parking lot; at the time Defendant stopped his vehicle, Officer Plummer did not direct Defendant to get out of Defendant's vehicle nor restricted Defendant's freedom of movement in any way; and at the time Defendant stopped, Officer Plummer had not given Defendant any orders or commands, indicate that Defendant was in custody or not free to leave, nor did Officer Plummer display a weapon or demonstrate "any other show of authority[.]"

¶ 65 Defendant first challenges Finding 16 where the trial court found: "That Officer Plummer testified that his intention was to engage in a voluntary consensual conversation with the Defendant." Defendant argues this Finding is invalid to support the trial court's conclusion because it constitutes a mere recitation of Officer Plummer's testimony rather than a true Finding of Fact. Although Defendant is correct in this assertion, this purported "Finding" does not impact the analysis of the trial court's conclusion because "the Fourth Amendment does not include a consideration of the officer's subjective intent, and his motive will not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *State v. Icard*, 363 N.C. 303, 318, 677 S.E.2d 822, 832 (2009) (Newby, J. dissenting) (quoting *Whren v. United States*, 517 U.S. 806, 812-13, 135 L. Ed. 2d 89, 98 (1996) (citation and quotation marks omitted)).

¶ 66 Defendant further challenges the portions of the trial court's Findings 24 and 25 establishing Officer Plummer had not indicated Defendant was in custody or not free to leave, had not taken any enforcement action, had not given Defendant any orders or commands, nor demonstrated any other show of authority to Defendant. Whether, however, Officer Plummer's actions in waving at Defendant to stop his vehicle constituted a show of authority is a question of law. *Icard*, 363 N.C. at 308, 677 S.E.2d at 826. Thus, this determination is reviewed de novo. *Id*. Therefore, as conclusions of law, these findings are more properly reviewed in tandem with our review of the trial court's labelled Conclusions of Law:

> 4. That pursuant to State v. Wilson, this Court has considered the factors that Officer Plummer was alone when he encountered the Defendant, that Officer Plummer did not draw his weapon, that Officer Plummer did not

activate his lights or siren on his patrol car, that Officer Plummer did not do or say anything to indicate to the Defendant that the Defendant was required to stop, and that the Defendant was in the Defendant's own vehicle and could have driven around Officer Plummer's patrol car.

5. That Officer Plummer had not initiated a traffic stop at the time of his conversation with the Defendant.

6. That Officer Plummer's conversation with the defendant was a voluntary, consensual conversation between Officer Plummer and the Defendant at a time when the Defendant's freedom of movement was not restricted, and Officer Plummer had made no show of authority to indicate that the interaction was a traffic stop or that the Defendant was under arrest.

7. That the Defendant was not seized under the Fourth Amendment when he voluntarily stopped his own vehicle in the parking lot next to Officer Plummer's patrol vehicle and began conversing with Officer Plummer.

¶ 67 "A seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *State v. Turnage*, 259 N.C. App. 719, 723, 817 S.E.2d 1, 4 (2018) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968)); *see also State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58 (1995) ("A seizure does not occur until there is a physical application of force or submission to a show of authority.") (citing *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991)). However, "[n]o one is protected by the Constitution against the mere approach of police officers in a public place . . . communication between the police and citizens involving no coercion or detention" does not implicate the Fourth Amendment. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (citations and quotation marks omitted). Rather, "[t]he test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *Id.* at 142, 446 S.E.2d at 586 (citing *Florida v. Bostick*, 501 U.S. 429, 434-38, 115 L. Ed. 2d 389, 398-99 (1991)).

¶ 68 When reviewing the totality of the circumstances surrounding an alleged show of authority, our courts review factors including but not

limited to: "the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *Icard*, 363 N.C. at 303, 309, 677 S.E.2d at 827 (citing *United States v. Drayton*, 536 U.S. 194, 153 L. Ed. 2d 242 (2002)). Moreover: "The activation of blue lights on a police vehicle" is a factor to consider but is not alone determinative. *State v. Baker*, 208 N.C. App. 376, 386, 702 S.E.2d 825, 832 (2010).

¶ 69 In *State v. Brooks*, the North Carolina Supreme Court concluded an officer did not need reasonable suspicion or probable cause to walk up to a man sitting in a vehicle and to ask the man—once the officer saw an empty gun holster next to the man—where the gun was. 337 N.C. at 142, 446 S.E.2d at 586. There, the Court reasoned the encounter with the uniformed officer was not a seizure because the officer did not apply force and the defendant did not submit to a show of force. *Id*. The officer simply asked a question, and when the defendant answered stating he was sitting on the gun, the officer then had probable cause to arrest the defendant and search the defendant's vehicle. *Id*.

¶ 70 This Court has also weighed in on whether the totality of the circumstances surrounding individuals' encounters with police constitute a seizure for Fourth Amendment purposes. We have held encounters not involving police applying physical force to be seizures requiring at least reasonable suspicion. In *State v. Knudsen*, police observed the defendant walking toward a car with a "clear cup" and in an area surrounded by restaurants that served alcohol. 229 N.C. App. 271, 275-76, 747 S.E.2d 641, 645-46 (2013). Officers, both in uniform with weapons, watched the defendant get into the car briefly, then get out and walk down a nearby sidewalk. *Id*. at 282, 276 S.E.2d at 649. One officer stopped his bicycle on the sidewalk in front of the defendant and the other parked his police vehicle behind the defendant in an alley cutting off the sidewalk behind the defendant. *Id*. at 283, 276 S.E.2d at 650. The officer on the bicycle asked the defendant what was in the cup. *Id*. We held the officers had seized the defendant when they blocked his path, and one officer asked the defendant what was in his cup. *Id*. We reasoned, after considering the totality of the circumstances, a reasonable person would not feel he or she was free to leave. *Id*.

¶ 71 However, we have held encounters where police do not use force or overt shows of authority were not seizures requiring at least reasonable suspicion. Our prior decisions in *State v. Williams*, 201 N.C. App. 566,

686 S.E.2d 905 (2009), and *State v. Wilson*, 250 N.C. App. 781, 793 S.E.2d 737 (2016), *aff'd per curiam*, 370 N.C. 389 (2017), are highly instructive.

¶ 72 In *Williams*, a police officer followed a car at approximately 1:30 a.m. because, as the officer testified, the car's license plate was dirty and obscured. 201 N.C. App. at 567, 686 S.E.2d at 906. As the officer followed the car and ran the license plate in the officer's computer, the car pulled into a driveway. *Id.* The officer then pulled his vehicle to the curb on the other side of the street from the driveway. *Id.* The officer approached the vehicle and recognized a passenger in the vehicle as someone he had seen in prior drug possession and prostitution arrests. *Id.* The officer asked the driver about the car's thirty-day tag; the driver responded that the tag was expired. *Id.* We held this was not a seizure and relied on our prior decision in *State v. Isenhour*, 194 N.C. App. 539, 670 S.E.2d 264 (2008). *Williams*, 201 N.C. App. at 571, 686 S.E.2d at 908-09 ("[O]ur Court noted: (1) that the defendant was free to drive away from the officers, as the patrol car did not physically block the defendant's car; (2) that nothing else in [the officer's] behavior or demeanor amounted to the show of force necessary for a seizure to occur[;] (3) that the officers did not create any real psychological barriers to [the] defendant's leaving such as activating their siren or blue lights, removing guns from their holsters, or using threatening language; and (4) that the encounter proceeded in a non-threatening manner and that [the] defendant was cooperative at all times.") (citations and quotation marks omitted).

¶ 73 Thus, as in *Isenhour*, we held the encounter in *Williams* was not a seizure because:

> [The officer] parked his patrol car on the opposite side of the street from the driveway in which Defendant was parked, and thus did not physically block Defendant's vehicle from leaving the scene. Further, Officer Wade did not activate the siren or blue lights on his patrol car. There is no evidence that he removed his gun from its holster, or used any language or displayed a demeanor suggesting that Defendant was not free to leave. As was the case in *Isenhour*, it appears that the encounter between Officer Wade and Defendant proceeded in a non-threatening manner and that [D]efendant was cooperative at all times. A reasonable person in these circumstances would feel free to disregard the police and go about his business.

201 N.C. App. at 571, 686 S.E.2d at 909 (citations and quotation marks omitted).

¶ 74 More recently, in *Wilson*, we held a similar encounter to the one in this case was not a seizure. An officer approached a house to inquire about a person wanted for arrest. *Wilson*, 250 N.C. App. at 782, 793 S.E.2d at 738. The officer parked his vehicle across the street from the house. *Id.* As the officer approached the house, he saw a vehicle backing out of the driveway. *Id.* The officer was behind the vehicle and waved his hands above his shoulders in order to get the vehicle to stop. *Id.* As soon as the officer approached the driver, he could smell alcohol and asked the driver how many drinks the driver had consumed. *Id.* In concluding this was not a seizure, we reasoned:

> Considering the totality of the circumstances, Officer Johnson's hand motions were not so authoritative or coercive that a reasonable person would not have felt free to leave. This holding is in line with established North Carolina precedent in cases in which no lights or sirens were used, no weapon was brandished, no language or behavior was used indicating compliance was mandatory, and the defendant's movement was not blocked.

Id. at 788, 793 S.E.2d at 742.

¶ 75 Here, as in *Williams*, Officer Plummer's encounter with Defendant was in the early morning hours. Officer Plummer was in uniform and driving a marked patrol vehicle but never activated his blue lights or siren, nor did he give any verbal commands to Defendant to stop. Although he did not merely approach Defendant on foot and ask Defendant a question, Officer Plummer waving his hand to get Defendant to stop is similar to the officer waving his arms in *Wilson*. Moreover: there were no other officers at the scene; Officer Plummer did not display his firearm; Officer Plummer did not block Defendant from leaving the parking lot; and Officer Plummer did not shout or use a tone of voice indicating authority—he simply asked Defendant if Defendant had seen anything regarding the earlier, single-car crash. Our existing precedent compels the conclusion this conversation would not lead a reasonable person to feel he or she was not free to leave.

¶ 76 Thus, in this case, the trial court properly considered the totality of the circumstances, including specifically applying the factors employed in *Wilson*, to conclude Officer Plummer's encounter with Defendant was voluntary. Therefore, the trial court further properly concluded Officer

Plummer's initial encounter was not a seizure for Fourth Amendment purposes. Defendant was not seized until Officer Plummer, already having at least reasonable suspicion Defendant was impaired, asked how many drinks Defendant had consumed and told Defendant to remain where he was as Officer Plummer maneuvered his vehicle behind Defendant's vehicle. Consequently, the trial court did not err by denying Defendant's Motion to Suppress.

¶ 77 The majority points to three "key differences" between this case and the above precedent: (1) that the encounter involved two moving vehicles; (2) the time and location of the encounter; and (3) "Officer Plummer's use of authoritative gestures to hail down Defendant's vehicle." Moreover, the majority accuses the trial court, and this dissent, of *ignoring* the fact that this case involved two moving vehicles. Not so. The trial court's Order, and this dissent, simply apply our existing precedent to the circumstances involving an officer in a vehicle gesturing to a defendant in another vehicle as presented in this case. As noted above, this precedent contemplates factors equally applicable to a determination of a show of authority, including when both the police and a defendant are in moving vehicles—for example, whether the officer has engaged the vehicle's blue lights or sirens. *Baker*, 208 N.C. App. at 386, 702 S.E.2d at 832.

¶ 78 This case, as noted above, is also similar in time and location to the time and location in *Williams*. Here, the encounter between Officer Plummer and Defendant began just before 3 a.m. In *Williams*, the encounter between the officer and the defendant occurred at approximately 1:30 a.m. Thus, both cases involved encounters with police in the early morning hours where, presumably, the officers and the defendants were not surrounded by other people and vehicle traffic. In *Williams*, the officer approached the vehicle in a *private* driveway, which may well be more coercive than here where Officer Plummer approached a vehicle in a parking lot. The majority points to Officer Plummer's "tailing" Defendant during the morning hours as particularly coercive. However, the officer in *Williams* also "tailed" the defendant. 201 N.C. App. at 567, 686 S.E.2d at 906. Moreover, the Record does not indicate Defendant in this case ever recognized Officer Plummer was following him.

¶ 79 Last, the majority asserts the trial court "overlooked" Officer Plummer's "authoritative physical gestures." However, the trial court expressly considered the facts and factors in *Wilson* in concluding Officer Plummer did not seize Defendant. In *Wilson*, the officer waved his arms above his shoulders in order to get the defendant to stop the defendant's

moving vehicle. *Wilson*, 250 N.C. App. at 782, 793 S.E.2d at 738. In this case, Officer Plummer rested his arm on his driver's window frame and moved his hand up and down to get Defendant's attention. Thus, if there is a distinction between the facts of this case and *Wilson*, it is that the physical gestures in *Wilson*—where we held there was no seizure—were arguably *more* authoritative than the gestures in this case.

¶ 80 The majority also asserts our application of existing precedent encourages the public to ignore, what the majority concedes are, police "requests" at the public's own legal peril. Again, not so. Cooperation between law enforcement and the public they serve in myriad of daily consensual, voluntary interactions is essential to a functioning civil society—and, to be clear, that cooperation and civility must extend *both* ways to avoid unnecessary escalation of these encounters. Our law recognizes, however, that there can be a fine line between a voluntary encounter with law enforcement and a Fourth Amendment seizure and further recognizes that the proper place for that line drawing exercise is in the courts and not on the streets—and, further still, that a trial court weighing all the circumstances and hearing and seeing the evidence first-hand is in the best place to make these crucial factual determinations.

IV. Conclusion

¶ 81 Here, the trial court properly conducted the analysis of the circumstances by finding facts supported by the evidence and which support its legal conclusions. The trial court's Order and subsequent Judgment entered upon Defendant's plea should be affirmed.

STATE OF NORTH CAROLINA
v.
CAMERON DIAMOND DEJUAN WALTON

No. COA20-211

Filed 20 April 2021

1. Search and Seizure—traffic stop—reasonable suspicion—extended stop—presence of drugs in vehicle

In a drug trafficking case, the trial court properly denied defendant's motion to suppress because competent evidence showed the officer had reasonable suspicion to stop defendant's car where he saw defendant speeding, confirmed defendant's speed with a radar gun, and observed what appeared to be illegally tinted windows on the car. Moreover, the officer permissibly extended the stop where he had reasonable suspicion to do so after smelling marijuana coming from the car and where a police dog arrived twelve minutes into the stop, remained there for eight minutes, performed a drug sniff, and detected drugs inside the car while the officer was still writing defendant a warning ticket for speeding (the mission of the initial stop had not yet been completed).

2. Search and Seizure—traffic stop—extended duration—probable cause—presence of drugs in vehicle

In a drug trafficking case, where an officer stopped defendant's car for speeding and a suspected window tint violation, the trial court properly denied defendant's motion to suppress because competent evidence showed the officer had probable cause to extend the stop after smelling an odor of marijuana coming from the car. The officer was trained in detecting marijuana by scent, and he could smell the odor with increasing intensity over the course of the stop. Moreover, an alert from a drug-sniffing police dog provided additional probable cause to search the vehicle.

3. Evidence—drug trafficking case—excluded evidence—offer of proof—no prejudicial error

After an officer stopped defendant as he was driving back from a friend's home, there was no prejudicial error at defendant's trial for drug trafficking where the trial court excluded testimony regarding the relationship between the friend's daughter and one of the cover officers who assisted with the traffic stop. The court permitted defendant to make a limited offer of proof presenting the fact of the relationship while excluding specific details of the relationship,

all of which were irrelevant to the court's ultimate finding that the officers had probable cause to prolong the stop.

4. Search and Seizure—traffic stop—police dog—reliability—drug detection—expired training certification

In a drug trafficking case, where a police dog performed a sniff search of defendant's car and alerted police to the presence of drugs, the trial court did not err in finding that—under the totality of the circumstances—the dog was reliable and proficient in detecting drugs. Although one of the dog's training certifications had expired less than a year before defendant's car was searched, and the officer handling the dog at the scene had (allegedly) failed to comply with departmental training guidelines, defendant did not challenge the substance of the expired certification at trial, and the dog also had a separate, unexpired certification still in effect.

Appeal by defendant from judgment entered 8 October 2019 by Judge Julia Lynn Gullett in Burke County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Helton, Cody & Associates, by Blair E. Cody, III, for defendant.

ARROWOOD, Judge.

¶ 1 Cameron Diamond Dejuan Walton ("defendant") appeals from judgment entered 8 October 2019 following his guilty plea to felony trafficking in opium. Defendant contends that the trial court erred in denying his motions to suppress and dismiss and in denying his request to make an offer of proof. For the following reasons, we affirm the trial court's judgment.

I. Background

¶ 2 On 13 December 2018, a Burke County grand jury indicted defendant for trafficking in opium or heroin by possession; possession with intent to manufacture, sell, or deliver cocaine; carrying a concealed weapon; and possession of a controlled substance on prison/jail premises. Defendant filed a motion to suppress the evidence supporting his indictment on 12 August 2019. On 30 August 2019, defendant filed an amended motion to suppress, and on 2 October 2019 defendant filed a "Motion to Dismiss/Suppress."

¶ 3 Defendant's motions were heard at the 7 October 2019 criminal session of Burke County Superior Court. The relevant facts from the suppression hearing are as follows.

¶ 4 On 5 April 2018, Officer Jesse Simmons ("Officer Simmons") of the Valdese Police Department observed a gold four-door Lexus traveling at an estimated 45 miles per hour in a 35 mile per hour zone shortly after midnight. Officer Simmons verified the speed with a radar gun and upon following the vehicle observed that he could not see inside the vehicle's windows. Officer Simmons initiated a traffic stop in a nearby parking lot.

¶ 5 Upon approaching the vehicle, Officer Simmons noted that defendant was the driver and sole occupant and informed defendant that he had been stopped for speeding and window tint. Officer Simmons observed that the windows were not illegally tinted but were instead darkened by electric window shades. While speaking with defendant, Officer Simmons noticed "a slight odor of marijuana coming from the car[,]" that seemed "covered up with some kind of cologne." At the hearing, Officer Simmons testified that he had received training in the detection of marijuana by scent.

¶ 6 After the initial conversation, Officer Simmons returned to his car to begin checking the status of defendant's driver's license and to determine whether defendant had any warrants. Officer Simmons also called Deputy Tim Branch ("Deputy Branch") of the Burke County Sheriff's Office to bring his K-9 unit to perform a drug sniff of defendant's vehicle. Officer Tyler Angley ("Officer Angley") of the Valdese Police Department was also dispatched to serve as a cover officer during the stop.

¶ 7 Officer Simmons returned to defendant's vehicle to perform a field sobriety test on the basis of defendant's speeding and erratic turn into the parking lot. Officer Simmons noted that the scent of cologne had faded and the odor of marijuana had grown stronger. After defendant got out of his car, Officer Simmons administered the horizontal gaze nystagmus ("HGN") field sobriety test and observed no sign of impairment. While administering the test, Officer Simmons informed defendant that he "smelled marijuana coming from the car[,]" which defendant denied.

¶ 8 Officer Simmons asked defendant to return to his vehicle, and Officer Simmons returned to his car to issue a written warning for speeding and unsafe movement. While Officer Simmons was in his car writing the warning ticket, Deputy Branch arrived on the scene with his dog and performed a sniff search of defendant's vehicle. The dog alerted to the presence of narcotics in defendant's vehicle.

¶ 9 After Deputy Branch informed Officer Simmons that the dog had alerted on defendant's car, Officer Simmons returned to defendant's vehicle and asked "if there was anything he would like to tell me about in the vehicle." Defendant said no. Officer Simmons asked defendant to step out of the vehicle, but defendant refused; when Officer Simmons opened the car door and repeated his request, defendant shut and locked the door and "placed his hands on the gear shifter as if he was going to put the car into gear." Officer Simmons requested backup and drew his taser, advising defendant that he would be tased if he did not exit the vehicle. Defendant then exited the vehicle.

¶ 10 Officer Simmons asked defendant if there was anything in the vehicle. Defendant stated that there was a gun under the seat. Officer Simmons entered the vehicle to retrieve the gun, and in a subsequent search found cocaine, digital scales, synthetic opioids, and $1,483.00 in cash.

¶ 11 The time elapsed between the initial stop and defendant's refusal to exit his vehicle was sixteen minutes. The time elapsed between the initial stop and the arrival of the police dog was twelve minutes. The police dog and his handler were at the scene for a total of eight minutes, and the dog took less than one minute to perform the sniff.

¶ 12 At the hearing, the State introduced evidence regarding the training and reliability of the police dog. Deputy Branch testified that the dog was certified for narcotics detection by both the United States Law Enforcement Canine Association and the North American Police Working Dog Association.

¶ 13 Defendant's trial counsel offered the testimony of Officer Angley, the cover officer at the scene, and Toni Bartlett ("Bartlett"), whose home defendant had left just prior to being stopped. This testimony was offered to provide evidence of the relationship between Officer Angley and Bartlett's daughter, but most of the evidence was excluded by the trial court. Defendant was allowed to make an offer of proof with a limited scope not to include proof related to any relationship between Officer Angley and Bartlett's daughter.

¶ 14 At the conclusion of the hearing on 8 October 2019, the trial court denied defendant's motion to suppress. Defendant subsequently pleaded guilty to the charge of felony trafficking in opium or heroin by possession with the remaining charges dismissed. The trial court sentenced defendant to a term of 16 to 29 months imprisonment, suspended on the condition that defendant serve 30 months of supervised probation, as well as an intermediate sanction of 7 months imprisonment.

II. Discussion

¶ 15 Defendant contends that the trial court erred in denying the motions to suppress and to dismiss, in denying defendant's request to make an offer of proof during the pretrial motion to suppress, and in finding that the police dog was proficient in detecting drugs.

A. Motions to Suppress & Dismiss

¶ 16 Defendant argues that the trial court erred in denying the motions to suppress and to dismiss because there was an improper prolonging of the stop, and the stop was made without probable cause or reasonable and articulable suspicion. We disagree.

1. Standard of Review

¶ 17 " 'The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.' " *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). A trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (quotation marks and citation omitted). "[O]nly a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations omitted).

¶ 18 If there is no material conflict in the evidence, this Court may review the undisputed factual record when determining whether the trial court's ruling was correct. *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995). "If there is no conflict in the evidence on a fact, failure to find that fact is not error[,]" and the finding is implied by the ruling of the court. *State v. Richmond*, 215 N.C. App. 475, 479, 715 S.E.2d 581, 585 (2011) (citation omitted).

2. Reasonable Suspicion

¶ 19 **[1]** A traffic stop is a seizure even if the purpose of the stop is limited and the resulting detention is brief. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotation marks and citation omitted). The necessary standard for stops based on traffic violations is "based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446

S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). To determine whether reasonable suspicion exists, courts must look to the totality of the circumstances as viewed from the standpoint of an objectively reasonable police officer. *State v. Johnson*, 370 N.C. 32, 34-35, 803 S.E.2d 137, 139 (2017) (citations omitted). The reasonable suspicion standard applies to all traffic stops for traffic violations "whether the traffic violation was readily observed or merely suspected." *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. This standard is less demanding than probable cause, and "requires a showing considerably less than preponderance of the evidence." *Id.* at 414, 665 S.E.2d at 439 (citation omitted). The standard is satisfied if an officer reasonably believes that a driver has violated the law. *Johnson*, 370 N.C. at 38, 803 S.E.2d at 141.

¶ 20 In this case, there was competent evidence to support the trial court's determination that Officer Simmons had reasonable suspicion to stop defendant's car. Officer Simmons personally observed defendant driving his car at a speed of 45 miles per hour in violation of the posted 35 mile per hour speed limit and verified his observation by measuring defendant's speed with the radar gun. In addition to the speeding violation, which would alone be sufficient to satisfy the reasonable suspicion standard, Officer Simmons also observed that defendant's car had what appeared to be tinted windows, allowing Officer Simmons to reasonably believe that defendant was violating a window tinting law. Accordingly, there was competent evidence to support the trial court's determination that Officer Simmons had reasonable suspicion to initiate the traffic stop.

¶ 21 Defendant additionally contends that Officer Simmons impermissibly extended the stop beyond his investigation into speeding and window tint to include impaired driving. We disagree.

¶ 22 The scope of detention incident to a traffic stop generally must be tailored to the purpose of the stop. *State v. Kincaid*, 147 N.C. App. 94, 98, 555 S.E.2d 294, 298 (2001). A traffic stop should generally not extend the duration of the stop beyond the time reasonably required to complete the "mission" of the stop, as well as attending to related safety concerns. *Rodriguez v. United States*, 575 U.S. 348, 354, 191 L. Ed. 2d 492, 498 (2015). An officer may inquire into matters unrelated to the justification for the stop, however, "so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333, 172 L. Ed. 2d 694, 704 (2009) (citation omitted). Stops may be extended if there is additional reasonable suspicion to do so. *State v. Heien*, 226 N.C. App. 280, 286-87, 741 S.E.2d 1, 5 (2013).

¶ 23 In this case, Officer Simmons initially stopped defendant for speeding and a suspected window tint violation and was permitted to continue the stop for the length of time required to conduct initial license and warrant checks and to issue the written warning. Officer Simmons extended the stop for further investigation into the odor of marijuana coming from defendant's car, which was based on the additional reasonable suspicion of Officer Simmons' observation of a marijuana odor. The time elapsed between the initial stop and the arrival of the police dog was twelve minutes, and the police dog was on the scene for eight minutes. The police dog performed the sniff and alerted on defendant's car while Officer Simmons was still in the process of writing the warning ticket. Because the mission of the initial stop had not yet been completed at the time the police dog alerted and in light of the circumstances, we hold that there was sufficient reasonable suspicion for the duration of the stop and that the stop was not impermissibly extended.

3. Probable Cause

¶ 24 **[2]** Defendant argues there was no probable cause to extend the stop after Officer Simmons determined there was not a window tint violation. We disagree.

¶ 25 Probable cause is not a "finely tuned standard" but instead requires "the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.' " *Florida v. Harris*, 568 U.S. 237, 243-44, 185 L. Ed. 2d 61, 67 (2013). The odor of marijuana "may form the basis of probable cause for a warrantless search of a vehicle." *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894-95 (1993) (citing *State v. Greenwood*, 301 N.C. 705, 273 S.E.2d 438 (1981)). Because illegal drugs are easily hidden or destroyed, the odor of marijuana generally creates "exigent circumstances justifying an immediate warrantless search." *State v. Yates*, 162 N.C. App. 118, 123, 589 S.E.2d 902, 905 (2004).

¶ 26 Here, Officer Simmons testified that although he incorrectly suspected that defendant had committed a window tint violation, he could smell marijuana with increasing intensity throughout the stop. Officer Simmons also provided testimony regarding his training and expertise in recognizing the odor of marijuana. The police dog's alert then provided additional probable cause to search the vehicle. Based on these circumstances, the trial court did not err in finding that there was probable cause to search defendant's vehicle.

B. Offer of Proof

¶ 27 **[3]** Defendant next contends that the trial court erred in denying defendant's request to make an offer of proof during the pretrial motion to dismiss. We disagree.

¶ 28 For a party to preserve the exclusion of evidence for appellate review, the significance of the excluded evidence must be apparent in the record and "a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citation omitted). A trial court may limit an offer of proof by allowing counsel to articulate what a defendant's showing would have been by identifying witnesses and presenting a detailed forecast of evidence for the record. *State v. White*, 349 N.C. 535, 567, 508 S.E.2d 253, 273 (1998).

¶ 29 The ultimate question is whether a defendant is prejudiced by the denial of an offer of proof. *State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978). The essential content or substance of the witness's testimony must be shown before ascertaining whether prejudicial error occurred. *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60 (citation omitted). If there is no reasonable possibility that the trial court's denial affected the result, any error in refusing the offer is harmless. *State v. Mackey*, 352 N.C. 650, 661, 535 S.E.2d 555, 561 (2000).

¶ 30 In this case, defendant's trial counsel was permitted to make an offer of proof after articulating that Bartlett's daughter's testimony regarding the relationship was relevant in the context of the stop. This offer of proof provided a forecast of evidence showing that Officer Angley had a prior relationship with Bartlett's daughter, that Officer Angley had eaten dinner at the Bartlett residence on several occasions, and that defendant had left the Bartlett residence just prior to the stop. The trial court only refused to allow a specific offer of proof with respect to the particular details of the relationship between Officer Angley and Bartlett's daughter on the grounds that these details were irrelevant to the probable cause at issue in the case. However, because the fact of the relationship was presented to the court, there was sufficient detail forecasted in the offer of proof.

¶ 31 Furthermore, the development of reasonable articulable suspicion was formed independently by Officer Simmons; Officer Angley testified that his involvement at the scene was "very little," and his testimony was largely irrelevant to the trial court's findings of fact. Due to the limited connection between the excluded evidence and the trial court's ultimate findings and conclusions, we hold that no prejudicial error occurred.

C. Police Dog Proficiency

¶ 32 **[4]** Defendant argues that the trial court erred in finding that the police dog was proficient in detecting drugs, alleging that the police dog and Deputy Branch were not in compliance with department policies as to

training and utilization and that the police dog's certification had expired. We disagree.

¶ 33 The United States Supreme Court has provided a framework for assessing a police dog's reliability, emphasizing that a police dog's reliability is best measured in controlled testing environments:

> [E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

Harris, 568 U.S. at 246-47, 185 L. Ed. 2d at 69. A defendant may challenge evidence of a dog's reliability by contesting the adequacy of a certification or training program, how the dog or handler performed in those assessments, and how the dog or handler has performed in the field. *Id.* at 247, 185 L. Ed. 2d at 69. "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id.* at 248, 185 L. Ed. 2d at 70.

¶ 34 In this case, the State presented evidence that the police dog had been certified a total of five times by two different organizations, with three certificates prior to the search in this case and two certifications between the time of the search and the suppression hearing. Although defendant argues that one of the prior certifications was expired at the time of the search, defendant makes no argument that the substance of the certification was deficient. In *Harris*, the Supreme Court found the dog to be reliable even though its certification had expired one year prior to the search at issue. *Id.* at 248, 185 L. E. 2d. at 70. The certification in this case similarly expired less than one year before the search

at issue. Furthermore, the dog in this case did still have one non-expired certification still in effect. Accordingly, there was sufficient evidence of the dog's certification and training for the reliability analysis.

¶ 35 Defendant further alleges error with respect to Deputy Branch's adherence to the utilization policy and departmental guidelines, specifically regarding the gap in training between 11 January 2018 and 31 January 2019. Defendant also acknowledges that North Carolina does not currently require any specific service dog training or requirements, although Burke County does require animals to be trained as a part of their policy requirements. Although the substance of the police dog's training and Deputy Branch's adherence to relevant guidelines are part of the overall inquiry, whether the dog is reliable is determined in the totality of the circumstances. Based on the totality of the circumstances in this case, the trial court did not err in finding that the police dog was reliable and proficient.

III. Conclusion

¶ 36 For the forgoing reasons, we hold that the trial court did not err in denying defendant's motions to suppress and to dismiss, and further hold that the trial court did not otherwise err in defendant's case.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE OF NORTH CAROLINA
v.
WILLIE HENDERSON WOMBLE

No. COA20-364

Filed 20 April 2021

1. Appeal and Error—preservation of issues—order granting motion to suppress—grounds not argued in motion

In the State's appeal from an order granting a criminal defendant's motion to suppress DNA evidence, where the trial court's basis for allowing the motion was not specifically argued before it, defendant's arguments seeking to uphold the order on that basis were preserved for appellate review. The trial court had authority to base its ruling on grounds other than those presented in the motion, and Appellate Rule 28(c) permitted defendant to raise any argument on appeal to support that ruling.

2. Criminal Law—DNA records—expungement—eligibility—section 15A-146—section 15A-148

Where the Department of Adult Corrections took a blood sample from defendant while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database, a three-judge panel in the superior court subsequently dismissed defendant's murder conviction, and the State sought to introduce the DNA evidence at defendant's trial for another murder, defendant was ineligible for expungement of his DNA sample under N.C.G.S. § 15A-148 because the three-judge panel did not constitute an "appellate court" under the statute, and defendant never received a pardon of innocence. Additionally, defendant's three prior felony convictions disqualified him from expungement of the DNA sample under N.C.G.S. § 15A-146.

3. Constitutional Law—North Carolina—Law of the Land Clause—DNA records—criminal expungement statute—constitutionality

Where the Department of Adult Corrections lawfully took a blood sample from defendant, pursuant to N.C.G.S. § 15A-266.4, while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database; a three-judge panel in the superior court subsequently dismissed defendant's murder conviction; and defendant moved to suppress his DNA sample at his trial for another murder, the trial court improperly granted defendant's motion on grounds that the expungement statute (N.C.G.S.

§ 15A-148) violated the North Carolina Constitution's "Law of the Land" Clause by assigning defendant the burden to petition for expungement of his DNA records rather than making expungement automatic upon his exoneration. Section 15A-148 is constitutional because the government has a legitimate interest in preserving convicted felons' DNA records to resolve past or later crimes, and the means for collecting DNA samples under section 15A-266.4 are reasonable.

4. Constitutional Law—federal—due process—government's taking and maintenance of DNA sample—criminal case

Where the Department of Adult Corrections took a blood sample from defendant while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database, a three-judge panel in the superior court subsequently dismissed defendant's murder conviction, and defendant moved to suppress his DNA sample at his trial for another murder, the trial court improperly granted defendant's motion. The government's taking and retention of the blood sample did not violate defendant's due process rights under the Fourteenth Amendment of the federal constitution where, as the Court of Appeals had determined, it did not violate defendant's rights under the North Carolina Constitution's "Law of the Land" Clause. Moreover, defendant could not claim a due process violation where he did not pursue the statutory minimum procedure (a petition) for the return of his blood sample.

5. Search and Seizure—exclusionary rule—fruit of poisonous tree—independent source doctrine—DNA sample

In a murder prosecution where defendant moved to suppress his DNA blood sample, which was drawn pursuant to N.C.G.S. § 15A-266.4 while he was incarcerated for a murder conviction (from over forty years ago) that was subsequently dismissed following an innocence inquiry, the exclusionary rule did not preclude the State from introducing the DNA sample, which was not the fruit of illegal police conduct. Defendant failed to show that his confession to the first murder (which resulted in his conviction and, eventually, the blood draw) was obtained through coercion. At any rate, a separate interview with law enforcement provided a lawful, independent source for his confession.

6. Search and Seizure—warrantless search—incarcerated inmate—right to privacy—DNA sample

Defendant's Fourth Amendment rights were not violated where the Department of Adult Corrections (DAC) took his blood sample,

pursuant to N.C.G.S. § 15A-266.4, while he was serving a life sentence for murder, and uploaded his DNA profile to the FBI's national DNA database. The government's interest in preserving convicted felons' DNA records to resolve past or later crimes outweighed defendant's privacy rights. At any rate, defendant could not assert a privacy claim or unreasonable search and seizure arguments with respect to the DNA sample where DAC lawfully obtained it.

7. Constitutional Law—effective assistance of counsel—innocence hearing—expungement of DNA records

Where the Department of Adult Corrections took a blood sample from defendant while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database, a three-judge panel in the superior court subsequently dismissed defendant's murder conviction following an innocence inquiry, and the State sought to introduce the DNA evidence at defendant's trial for another murder, the trial court in the second murder prosecution properly rejected defendant's claim that he received ineffective assistance of counsel at his innocence proceedings. Defendant was not entitled to expungement of his DNA records under N.C.G.S. §§ 15A-146 or 15A-148, and therefore his counsel's failure to petition for expungement did not render counsel's performance deficient.

8. Search and Seizure—inevitable discovery doctrine—no temporal component—DNA sample

In a murder prosecution where defendant moved to suppress his DNA blood sample, which was drawn pursuant to N.C.G.S. § 15A-266.4 while he was incarcerated for a murder conviction (from over forty years ago) that was subsequently dismissed, the trial court erred by not allowing the State to present evidence that the DNA sample—even if unconstitutionally seized—was admissible under the inevitable discovery doctrine. Specifically, the trial court improperly excluded an officer's testimony—that the murder investigation would have inevitably focused on defendant in light of certain police incident reports—because the officer learned of defendant's DNA matching to blood at the crime scene before he read the reports. The inevitable discovery doctrine only required that the DNA sample would have inevitably been discovered, regardless of when.

Appeal by the State from order entered 13 January 2020 by Judge Allen Baddour in Chatham County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jeffrey B. Welty, for the State.

Patterson Harkavy LLP by Narendra K. Ghosh and Bradley J. Bannon and Thomas, Ferguson & Beskind, L.L.P by Jay H. Ferguson for defendant-appellee.

TYSON, Judge.

¶ 1 The State appeals from an order granting Willie Henderson Womble's ("Defendant") motion to suppress DNA evidence. We reverse and remand.

I. Background

¶ 2 Roy Brent Bullock was shot two times during a robbery and murdered while working at a Food Mart grocery store in Butner on 18 November 1975, as his thirteen-year-old daughter watched through a glass cooler. The North Carolina State Bureau of Investigation ("SBI") and Police Officers investigating Bullock's murder developed a list of suspects known to be involved with suspected robberies in the area. Joseph Perry, Albert Willis, and Defendant's names were on that list of suspects.

¶ 3 Durham Police Detective Lorenzo Leathers ("Detective Leathers") interviewed Defendant on matters unrelated to the Bullock homicide on 6 December 1975. Defendant made a statement to Detective Leathers about an "incident that happened over in Butner." Defendant allegedly named Perry as the shooter and corroborated the victim's statements before he died, and Bullock's daughter's testimony, that the shooter had worn, "a red and black or red and blue bandanna over the lower portion of his face." Defendant's statement was written down by Detective Leathers and was signed by Defendant. Later, Defendant's statement was typed and was again signed by Defendant. Defendant independently corroborated and acknowledged his statements the following day to SBI Agent Joseph Momier, without Detective Leathers present.

¶ 4 Detective Leathers testified Defendant was presented with three documents during the 6 December 1975 interrogation and the following day: a rights wavier form, a detailed confession handwritten by Detective Leathers, and the typewritten copy of the confession. Defendant's trial counsel did not challenge his waiver, move to suppress his confessions or Detective Leathers' testimony, nor objected when Detective Leathers testified at trial.

¶ 5 Defendant's statement and confession indicated his involvement with Perry, Willis, and another individual, James "Boo Boo" Frazier with the robbery and Bullock's murder. Defendant stated Perry had given him twenty dollars to act as the "lookout" during the robbery and Bullock's murder.

¶ 6 Defendant testified on his own behalf at trial. He stated he had felt pressured to make the statements because the officers were "trying to blow their breath all in [his] face." Defendant also stated he was "high off beer" or under the influence when he made the confessions. Defendant presented two alibi witnesses. However, Defendant's purported alibi lost credibility after evidence of local television programming showed the testimony of his two alibi witnesses could not have been accurate.

¶ 7 The jury unanimously found Defendant guilty of first-degree felony murder and he was sentenced to life imprisonment on 7 July 1976. The Supreme Court of North Carolina unanimously found no error in his conviction. *See State v. Womble*, 292 N.C. 455, 233 S.E.2d 534 (1977) (Moore, J.).

¶ 8 Joseph Perry was tried for first-degree murder of Roy Brent Bullock on 3 and 4 November 1976. The State presented eyewitness testimony that Perry had shot a convenience store clerk in Durham two weeks before Bullock's murder. Shell casings recovered from both murder scenes were fired from the same gun. Perry was convicted of first-degree murder and sentenced to life imprisonment on 4 November 1976.

A. *State v. Bowden* and *Jones v. Keller*

¶ 9 In *State v. Bowden*, 193 N.C. App. 597, 600, 668 S.E.2d 107, 109 (2008), this Court held the Fair Sentencing Act, N.C. Gen. Stat. § 14-2 (1974), "treats [a] defendant's life sentence as an 80-year sentence for all purposes." Offenders sentenced pursuant to N.C. Gen. Stat. § 14-2 between 1974 and 1978 argued they were entitled to sentence reduction and "good time" and "gain time" credits, which rendered them eligible for immediate or imminent release. *Id.*

¶ 10 In preparation for this possible release of inmates affected by the ruling in *Bowden*, the North Carolina Department of Adult Correction ("DAC") took blood samples of all inmates. The blood samples were taken in compliance with N.C. Gen. Stat. § 15A-266.4 (2009) (person who "has been convicted and incarcerated as a result of a conviction. . . shall provide a DNA sample before parole or release from the penal system"). Defendant's blood sample was drawn without recorded objection on 28 October 2009 and was used to develop his DNA profile. Defendant's

DNA profile was uploaded to the Federal Bureau of Investigation's Combined DNA Index System ("CODIS") on 2 February 2010.

¶ 11 The North Carolina Supreme Court later held the DAC's denial of a prisoner's "good time, gain time, and merit time for the purpose of unconditional release" from life sentences imposed under Fair Sentencing has a rational basis. *Jones v. Keller*, 364 N.C. 249, 259-60, 698 S.E.2d 49, 58 (2010). Defendant remained in the custody of DAC under the judgment and sentence for life imprisonment entered on the jury's conviction for the Food Mart robbery and Bullock's murder.

B. Innocence Inquiry

¶ 12 In 2013, Defendant's co-defendant, Joseph Perry, wrote the North Carolina Innocence Inquiry Commission ("Commission") admitting his own participation with Albert Willis in Bullock's murder, but asserted Defendant had not been involved. Perry told Commission staff that Willis was the only person with him during the murder and Defendant was not involved in any way. Commission staff interviewed Defendant, who asserted his innocence and applied to the Commission to review his case. Defendant repeated his rejected claims from trial that his confession was false, and he had an alibi.

¶ 13 The Commission gathered records indicating DAC had assessed Defendant's Intelligence Quotient ("IQ") at various levels between a 66 in 1977 to a 74 in 1998. Defendant was documented as having left school when he was 17, unsure of what grade he had completed "since he was in special education classes throughout his schooling." Defendant's records were inconsistent to the level of education attained, stating variously the 8th, 9th, or 11th grade. Defendant was diagnosed with a form of paranoid schizophrenia, was developmentally disabled, and has borderline intellectual functioning. Defendant admitted he can read, write, perform simple mathematics, and "spell some five letter words."

¶ 14 Based upon Defendant's, Perry's, and the alibi witnesses' statements, the Commission unanimously found sufficient evidence of Defendant's innocence to merit judicial review. No member of law enforcement, the prosecution or Bullock's family testified before the Commission. The three-judge panel held a hearing to review Defendant's claim of innocence on 2 and 3 June 2014. *See* N.C. Gen. Stat. § 15A-1469(a) (2019). Before the three-judge panel, the current district attorney of Granville County, who had no previous connection to Defendant's trial, conceded the unconstitutionality of his confession. Defendant's counsel argued his client was mentally handicapped, had been forced by Detective Leathers

to sign a confession he did not understand, and asserted Detective Leathers had committed perjury during Defendant's trial.

¶ 15 Detective Leathers had testified at the original trial he did not "have any idea about" the Bullock murder prior to Defendant's interview on 6 December 1975. Regarding the 6 and 7 December 1975 interviews, Detective Leathers testified Defendant could read and write, had waived his rights, and had read and understood the confession before he knowingly signed it.

¶ 16 Evidence was produced during the Commission's hearing tending to show Detective Leathers had met with SBI Agent Joseph Momier and Butner Public Safety Officer Nelson Williams on 19 November 1975 to develop possible suspects.

¶ 17 The Commission found Defendant was "illiterate" "for all practical purposes." The three-member panel of superior court judges was appointed by Chief Justice Sarah E. Parker, consisting of Judges Vance Bradford Long, Phyllis M. Gorman, and J. Carlton Cole. Relying on the Commission's record and without taking additional evidence, the panel unanimously concluded Defendant had proven his innocence by clear and convincing evidence and ordered his immediate release on 17 October 2014. Defendant was freed by the DAC pursuant to the 17 October 2014 order.

C. Todd Homicide Investigation

¶ 18 Two and one-half years later, a social worker assisting Pittsboro resident, Donna Todd, reported to the Pittsboro Police Department on 11 April 2017 that she had not heard from Todd in over a week. Officer Franks and Detective Clarence Johnson went to Todd's apartment at the Creekside Apartments to conduct a well-being status check.

¶ 19 Upon opening the door, the police officers found Todd's partially decomposed body lying face-down on the floor of the apartment, approximately four feet from the door. A pair of scissors were protruding from the back of Todd's head near her left ear. She had been stabbed at least seven times and cut more than five times in her head, neck, and upper back. Todd had also suffered two broken ribs. The autopsy concluded she died from "multiple sharp and blunt force injuries."

¶ 20 The apartment was in disarray and had papers strewn throughout. A large spot of blood was observed on the floor near the couch in the living room, a tray had been knocked over, and bi-fold doors going toward the bedroom were knocked down. A woman's wallet with blood on it was found on top of an ottoman. Officers observed a broken lamp on

the floor near the couch with stains that appeared to be blood thereon. Officers also found a beer can in the apartment.

¶ 21 The officers concluded the conditions inside the apartment indicated a struggle had occurred in several rooms. A bent knife, wallet, beer can, lamp, and other items from the apartment were collected and taken into evidence.

¶ 22 Officers conducted a neighborhood canvas of residents of Creekside Apartments. Defendant and his then-girlfriend, Lynn Myrie, also lived in the Creekside Apartments. Both initially denied knowing Todd or having contact with her. Defendant told officers he thought Todd's boyfriend was "Mr. Hooks" or "Hooky," a man later identified as Thel Riley.

¶ 23 Defendant later admitted he had provided Todd with cigarettes up until four months prior to her murder. Defendant also admitted he would occasionally give Todd a ride to the Piggly Wiggly grocery store. Defendant said these contacts had stopped after Todd had told Myrie "he [Defendant] was trying to get with her."

¶ 24 On 3 May 2017, the Pittsboro Police Department submitted the items recovered from the crime scene to the State Crime Lab. The State Crime Lab confirmed the stain on the broken lamp was human blood. The State Crime Lab was able to obtain a DNA profile from the blood on the lamp and submitted it to CODIS. A beer can seized from the apartment did not return a CODIS match. The State Crime Lab learned the DNA profile from the broken lamp matched Defendant's profile drawn on 28 October 2009 by DAC.

¶ 25 The State Crime Lab performed a confirmatory analysis by retesting Defendant's profile taken 28 October 2009. The confirmatory analysis also validated the DNA match of the blood on the lamp with Defendant. The State Crime Lab reviewed Defendant's criminal record and learned the first-degree murder conviction for which he was incarcerated when the 28 October 2009 sample was drawn had been dismissed.

¶ 26 The State Crime Lab's legal counsel believed Defendant's sample should be excluded from CODIS because the underlying conviction necessitating the sample had been dismissed. As a result, the State Crime Lab did not notify the Pittsboro Police Department of the CODIS match of the blood on the lamp to Defendant's DNA. The investigation had eliminated Riley as a suspect in Todd's murder and the investigation continued into other residents at the Creekside Apartments.

¶ 27 On 15 April 2017, an anonymous caller contacted the Pittsboro Police Department and reported and identified Defendant as Todd's

killer. The anonymous caller explained Todd had confronted Defendant for "hitting on her." Todd had informed Myrie of Defendant's advances. Defendant became upset at Todd for telling Myrie of his actions, and he had wanted to "get" Todd. The identity of the anonymous caller was later identified in discovery requested by Defendant to be a close relative of Defendant.

¶ 28 Joseph Alibrandi, Todd's stepfather, had spoken to Todd shortly before her murder near the end of March 2017. Albrandi reported Todd had told him about a person living in her apartment complex who was "trying to hit on her" which was "causing her some distress."

¶ 29 Police responded to six reports of disturbances or assaults by Defendant and Myrie between March 2017 and August 2017. In a 911 recording, Defendant was heard yelling "If I go to jail again . . . I will kill your muthaf---n' ass." and "If I go to jail again . . . it's going to be for muthaf---n' murder."

¶ 30 On 29 November 2017, the State Crime Lab notified the Pittsboro Police Department that Defendant's DNA sample matched the DNA recovered from the blood on the lamp. Detective Johnson re-interviewed Defendant, wherein Defendant denied ever having been inside Todd's apartment. Defendant refused to provide a voluntary DNA sample.

¶ 31 Officers obtained a search warrant for a new DNA sample from Defendant on 23 January 2018. Detective Johnson's affidavit for the search warrant "acknowledge[d] that the conviction associated with the DNA sample in the CODIS database was later overturned, that no other qualifying event had occurred, but that the State Crime Lab had not received an order for expunction."

¶ 32 Officers executed the search warrant on 24 January 2018. On 7 February 2018, the State Crime Lab found a profile from the blood on the broken lamp was consistent with the DNA profile taken from Defendant's 24 January 2018 sample. The State Crime Lab found Defendant could not be excluded as a contributor of the DNA found on other DNA profiles from blood on the broken lamp and the stained wallet. On 28 February 2018, Defendant was charged with first-degree murder.

¶ 33 Defendant filed a motion to suppress the DNA evidence obtained from him and all evidence obtained as a result of the 23 January 2018 search warrant. The trial court held an evidentiary hearing on 14 and 15 May 2019 and final oral arguments on 4 September 2019 on the motion to suppress. Defendant and the State both submitted post-hearing briefs to the trial court.

¶ 34 Before the trial court, Defendant argued the evidence should be suppressed because: (1) it was obtained as a result of the unconstitutional coercion of Defendant's 6 and 7 December 1975 confession to the Bullock murder; (2) obtained as a result of a warrantless search in 2017 conducted without exigent circumstances; and, (3) Defendant's counsel's failure to petition for expungement of his DNA records during Defendant's innocence hearing on 2 and 3 June 2014 constituted ineffective assistance of counsel.

¶ 35 The trial court found and concluded Defendant's DNA was lawfully seized in 2009 and retained by the State, and the attorneys, who had represented Defendant on his innocence proceedings, did not provide him ineffective assistance of counsel. However, the trial court allowed Defendant's motion to suppress.

¶ 36 The trial court held the General Assembly "could . . . have chosen to make expunction automatic in the course of exonerations or reversals of convictions, but did not and instead place[d] the burden of seeking expungement on the defendant," and ordered the DNA evidence to be excluded. Without being asserted or briefed by either Defendant or the State, the trial court concluded this lack of "expunction automatic in the course of exonerations or reversals" places "an unconstitutional burden on the defendant" in violation of the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution. The State filed timely notice of appeal.

II. Jurisdiction

¶ 37 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 15A-979(c) and 15A-1445 (2019) from the State's appeal of the superior court's order granting Defendant's motion to suppress.

III. Issue

¶ 38 The State argues the trial court erred in granting Defendant's motion to suppress.

IV. Standard of Review

¶ 39 "The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the

evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation omitted).

¶ 40 Findings of fact not challenged on appeal are deemed supported by competent evidence and are binding upon this Court. S*tate v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

V. Law of the Land Clause

¶ 41 The State does not challenge any of the findings of fact made by the trial court in the order granting Defendant's motion to suppress. These findings are binding upon appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

A. Preservation

¶ 42 **[1]** The State argues the trial court erred in granting Defendant's motion to suppress. It asserts the basis for allowing the motion, the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution, was not specifically argued before the trial court. The State asserts appellate review is barred because that specific reason was not raised before the trial court.

¶ 43 Before the trial court, Defendant's attorney argued for the motion to suppress "because 15A-266.4 violates the State Constitution and the Fourth Amendment." Defendant also argued his innocence hearing counsel provided ineffective assistance by failing to petition for expungement upon his exoneration.

¶ 44 "[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and internal quotation marks omitted). Our Appellate Rules provide: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. 10(a)(1).

¶ 45 Rule 10(a)(1) applies to constitutional challenges. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003). Our Supreme Court and this Court have consistently denied appellate review of unpreserved constitutional issues. *See State v. Golphin*, 352 N.C. 364, 403-04, 533 S.E.2d 168, 197 (2000) ("This Court is not required to pass upon a

constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." (citation omitted)). "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) (citation omitted).

¶ 46 N.C. Gen. Stat. § 15A-977(a) provides "the motion to suppress must state the grounds upon which it is made." N.C. Gen. Stat. § 15A-977(a) (2019).

¶ 47 In *State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985), the defendant argued in his motion to suppress the confession was involuntary. The trial court allowed a motion to suppress because the police failed to give the *Miranda* warnings prior to custodial interrogation. *Id.* This Court held "[t]he decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court." *Id.*

¶ 48 This Court applied *Harvey* in *State v. Colbert*, 146 N.C. App. 506, 553 S.E.2d 221 (2001). There, a trial court allowed a motion to suppress in a driving while impaired case on a ground not specifically raised by the defendant in his motion to suppress. *Id.* at 507, 553 S.E.2d at 223. This Court held: "Once the trial court decides not to dismiss the motion but rather to have a hearing, the court may base its conclusion on grounds other than those set forth in the motion." *Id.* at 508, 553 S.E.2d at 223 (citation omitted).

¶ 49 Rule 28 of the North Carolina Rules of Appellate Procedure states: "an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c). "Our precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and ultimate ruling to, in fact, choose and run *any* horse to race on appeal to sustain the legally correct conclusion of the order appealed from." *State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017) (emphasis original) (citations and internal quotation marks omitted).

¶ 50 The trial court acted within its inherent power to consider the motion to suppress and to grant on grounds or reasons not specifically argued below by Defendant or the State. The ruling is preserved for appellate review. N.C. R. App. P. 28(c).

B. Eligibility for Expungement

¶ 51 **[2]** To address the parties' arguments regarding Defendant's eligibility for expungement, we review N.C. Gen. Stat. §§ 15A-146 and 15A-148. In reviewing these statutes, we are guided by several well-established principles and precedents of statutory construction.

¶ 52 "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

¶ 53 "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by the disjunctive, application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either one of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

¶ 54 "[S]tatutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks, citations, and alterations omitted).

¶ 55 Further, our Supreme Court has held, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control[.]" *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

¶ 56 N.C. Gen. Stat. § 15A-148 addresses orders of expunction and provides:

> (a) *Upon a motion by the defendant following the issuance of a final order by an appellate court reversing and dismissing a conviction of an offense for which a DNA analysis was done in accordance with Article 13 of Chapter 15A of the General*

> *Statutes*, or upon receipt of a pardon of innocence with respect to any such offense, the court shall issue an order of expungement of the DNA record and samples in accordance with subsection (b) of this section. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the North Carolina State Crime Laboratory to send a letter documenting expungement as required by subsection (b) of this section.
>
> (b) When an order of expungement has been issued pursuant to subsection (a) of this section, the order of expungement, together with a certified copy of the final appellate court order reversing and dismissing the conviction or a certified copy of the instrument granting the pardon of innocence, shall be provided to the North Carolina State Crime Laboratory by the clerk of court. Upon receiving an order of expungement for an individual whose DNA record or profile has been included in the State DNA Database and whose DNA sample is stored in the State DNA Databank, the DNA profile shall be expunged and the DNA sample destroyed by the North Carolina State Crime Laboratory, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the North Carolina State Crime Laboratory to the defendant and the defendant's attorney at the address specified by the court in the order of expungement. . . .
>
> (c) *Any petition for expungement* under this section shall be on a form approved by the Administrative Office of the Courts and be filed with the clerk of superior court. Upon order of expungement, the clerk shall forward the petition to the Administrative Office of the Courts.

N.C. Gen. Stat. § 15A-148 (2019) (emphasis supplied).

¶ 57 N.C. Gen. Stat. § 15A-148 allows a defendant to petition for expungement of their "DNA record and samples," "following the issuance of a

final order by an appellate court reversing and dismissing a conviction of an offense for which a DNA analysis was done" or "upon receipt of a pardon of innocence." *Id.* The trial court concluded the statute violated the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution for not mandating automatic expunction upon Defendant's exoneration and granted Defendant's motion to suppress.

¶ 58 Defendant failed to petition to have his DNA record expunged. The State argues Defendant was not eligible for expungement because an "appellate court" did not dismiss Defendant's conviction. Defendant argues the State has waived this argument by not arguing it before the trial court. As asserted above, the trial court decided the motion on a basis not argued before it. At this Court, the State argued and briefed the results of the DNA tests should be allowed in the upcoming trial under N.C. Gen. Stat. § 15A-148. Alternatively, and in the exercise of our discretion, we invoke Rule 2 of the Rules of Appellate Procedure to review this argument. N.C. R. App. P. 2.

¶ 59 N.C. Gen. Stat. § 15A-148(a) contains two clauses in the disjunctive. Neither applies to Defendant. Defendant received a dismissal of the first-degree felony-murder conviction from the three-judge panel, based upon the recommendation of the Commission and the stipulation of the Granville County District Attorney. At oral argument, Defendant's counsel conceded Defendant did not receive a "pardon of innocence" and asserted we should construe that the three-judge superior court panel constitutes an "appellate court" under N.C. Gen. Stat. § 15A-148. Defendant asserts the three-judge panel is an appellate court because it was the court commissioned by Chief Justice Parker to review his 1976 conviction for the felony-murder of Bullock.

¶ 60 After the Commission's finding of sufficient evidence of factual innocence to merit judicial review, the Chief Justice appoints a three-judge panel to "convene a special session of the superior court of the original jurisdiction [of the case] to *hear evidence* relevant to the Commission's recommendation." N.C. Gen. Stat. § 15A-1469(a) (2019) (emphasis supplied) (The trial court applied N.C. Gen. Stat. § 15A-1469 (2019), which was amended effective 1 December 2019 by N.C. Gen. Stat. §15A-1469 (Supp. 2020)). "The three-judge panel *shall conduct* an evidentiary hearing." N.C. Gen. Stat. § 1469(d) (2019) (emphasis supplied). This Court has consistently held: "An appellate court does not sit as the finder of fact." *State v. Crews*, 66 N.C. App. 671, 675, 311 S.E.2d 895, 897 (1984). Unlike when the superior court sits as an appellate court reviewing the actions of a county or municipality zoning board on a closed record, the three-judge panel is tasked under the

statute to "hear[ing] evidence relevant to the Commission's recommendation." N.C. Gen. Stat. § 15A-1469(a).

¶ 61 The State asserts Defendant is also ineligible for expunction under N.C. Gen. Stat. § 15A-146 (2019). N.C. Gen. Stat. § 15A-146 provides, *inter alia*:

> (a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, that person may petition the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the petition and, upon finding that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. . . .
>
> (a1) Notwithstanding subsection (a) of this section, if a person is charged with multiple offenses and the charges are dismissed, then a person may petition to have each of the dismissed charges expunged. The court shall hold a hearing on the petition. *If the court finds that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction.*
>
> (a2) If any person is charged with a crime, either a misdemeanor or a felony, or an infraction under G.S. 18B-302(i) prior to December 1, 1999, and a finding of not guilty or not responsible is entered, that person may petition the court of the county where the charge was brought for an order to expunge from all official records any entries relating to apprehension or trial of that crime. The court shall hold a hearing on the petition and upon finding that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. . . . If a person is charged with multiple offenses and findings of not guilty or not responsible are made on charges, then a person may petition to have each of the charges

disposed by a finding of not guilty or not responsible expunged. The court shall hold a hearing on the petition. If the court finds that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction.

. . . .

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the North Carolina State Crime Laboratory to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the North Carolina State Crime Laboratory shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the North Carolina State Crime Laboratory to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

N.C. Gen. Stat. § 15A-146 (emphasis supplied) (The trial court applied N.C. Gen. Stat. § 15A-146 (2019), which was amended effective 1 December 2020 by N.C. Gen. Stat. §15A-146 (Supp. 2020)).

¶ 62 Defendant had two prior felony convictions for larceny and a felony conviction for breaking and entering unaffected by the dismissal of his prior murder conviction. Under the plain language of N.C. Gen. Stat. § 15A-146, Defendant is not entitled to an expungement.

¶ 63 The State further argues Defendant was not eligible for expungement because N.C. Gen. Stat. § 15A-148(b) provides "except that the order [to expunge] shall not apply to other offenses committed by the individual that qualify for inclusion in the State's DNA Database and the State DNA Databank." N.C. Gen. Stat. § 15A-148(b).

¶ 64 Defendant argues the State has not preserved this argument for appellate review. Before the trial court, the State presented Defendant's certified prior criminal record. In addition to the first-degree felony murder conviction, Defendant had been convicted of multiple counts of larceny, burglary of habitation, larceny from auto, burglary forced entry non-residential, larceny from a building, burglary forced entry non-residential store breaking, larceny from a building, and passing forged checks. Defendant pleaded guilty to two counts of felony larceny and two counts of misdemeanor larceny.

¶ 65 Before the trial court, the State conceded "None of these prior arrests or convictions would have triggered the collection of the DNA of [Defendant] under the law at the time of arrest, conviction, or incarceration." "Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct" order to "run any horse to race on appeal to sustain the legally correct conclusion of the order appealed." *Hester*, 254 N.C. App. at 516, 803 S.E.2d at 16. "The law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 206-07, 638 S.E.2d 516, 525 (2007). The State, as appellant seeking to overturn the trial court's order, cannot now assert the Defendant's prior felony convictions would nullify application of N.C. Gen. Stat. § 15A-148.

¶ 66 The 28 October 2009 sample was lawfully collected from Defendant in 2009 while he was incarcerated under a judgment entered upon a unanimous jury's verdict for first-degree felony murder, and was reviewed with no error by a unanimous Supreme Court. As the trial court properly found and concluded, this random blood draw during incarceration was both lawfully taken and maintained pursuant to the

authority in N.C. Gen. Stat.§ 15A-266.4 (2019). That portion of the trial court's order is affirmed.

¶ 67 Defendant was not eligible for expulsion or expungement of the DNA sample under either N.C. Gen. Stat. §§ 15A-146 or 15A-148.

C. Automatic Expungement

¶ 68 **[3]** The trial court granted Defendant's motion to suppress, holding the statute not authorizing automatic expunction upon Defendant's exoneration was constitutionally deficient and prejudicial in violation of the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution.

¶ 69 N.C. Gen. Stat. § 15A-148 allows a defendant to petition for expungement of their "DNA record and samples" "upon receipt of a pardon of innocence." N.C. Gen. Stat. § 15A-148. Federal law requires all states participating in CODIS to establish expungement provisions. 34 U.S.C. § 12592 (d)(2)(A) (2018). 34 U.S.C. § 12592 does not specify the specific procedure states must establish for participation in CODIS.

¶ 70 Our General Assembly places the burden on the defendant to petition to initiate the expungement proceedings. In *State v. Swann*, this Court examined a defendant's petition to expunge his DNA record. *State v. Swann*, 197 N.C. App. 221, 222, 676 S.E.2d 654, 656 (2009). The defendant offered his petition as evidence at his motion to suppress. *Id.* This Court affirmed the trial court, wherein the defendant was attempting to "retroactively expunge his DNA records after they had been used by law enforcement to identify him as the perpetrator in a number of crimes." *Id.* at 224, 676 S.E.2d at 657.

¶ 71 This Court further reasoned expungement of a record extinguishes a record as if it never existed, but "this only occurs *after* the order of expunction has been entered." *Id.* (emphasis original). "[T]he intent of the legislature that the effect of the expunction is prospective only." *Id.* The expungement statute, N.C. Gen. Stat. § 15A-148, is prospective only, not retrospective.

¶ 72 Defendant's murder charge was dismissed by the 17 October 2014 order. Defendant was not eligible to have his 28 October 2009 sample automatically destroyed and the corresponding DNA profile expunged from CODIS. Our General Assembly places this burden on the individual to petition, as is directed by 42 U.S.C. § 14132. The trial court held this affirmative burden placed an "unconstitutional burden on the defendant" in violation of the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution. At no time at his earlier trial, before the

trial court, or this Court does Defendant assert he was incompetent or offer any basis to support his inaction.

¶ 73 Article I, Section 19 of the North Carolina Constitution provides, *inter alia*: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. The Law of the Land Clause has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause. *See State v. Collins*, 169 N.C. 323, 32[4], 84 S.E. 1049, 1050 (1915).

¶ 74 "[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though, not controlling authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Supreme Court has "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution." *In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (citation omitted).

¶ 75 The constitutional inquiry under the Law of the Land Clause is: "(1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?" *Id.* (citations omitted). The government's interest in preserving an identification record of convicted felons for resolving past or future crimes is a legitimate government objective. *See Maryland v. King*, 569 U.S. 435, 453, 186 L. Ed. 2d 1, 24 (2013).

¶ 76 The second prong of the Law of the Land Clause inquiry is also met. N.C. Gen. Stat. § 15A-266.4 provides for the collection of DNA evidence from an inmate prior to release. Under the circumstances articulated in N.C. Gen. Stat. §§ 15A-146 and 15A-148, a defendant can petition for samples to be destroyed and DNA profiles to be expunged from CODIS.

¶ 77 The trial court's suppression of the DNA evidence based upon the Law of the Land Clause denied the longstanding presumption of validity of legislative policy choices and is error. The application of N.C. Gen. Stat. § 15A-148 is presumed to be, and is, constitutional under the Law of the Land Clause. *In re Meads*, 349 N.C. at 671, 509 S.E.2d at 175. The trial court's order concluding otherwise is reversed.

VI. Due Process

¶ 78 **[4]** Defendant and the State present additional arguments, which are likely to re-occur on remand. Defendant argues the trial court's order

suppressing the DNA evidence should be alternatively affirmed because the evidence violates the Due Process Clause of the Fourteenth Amendment. The trial court's order did not find and conclude the taking of or maintaining the results of the blood sample as unconstitutional under the Due Process Clause.

¶ 79 "Due Process provides two types of protection for individuals against improper government action." *State v. Fowler*, 197 N.C. App. 1, 20, 676 S.E.2d 523, 540 (2009) (citation and internal quotation marks omitted). The "two types" of protection are procedural and substantive due process. *Id.* "Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975). "Substantive Due Process protection prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (citations and internal quotation marks omitted).

¶ 80 "Procedural due process protection ensures that when the government action depriving a person of life, liberty, or property survives substantial due process review, that action is implemented in a fair manner." *Id.* (citations and internal quotation marks omitted).

¶ 81 Our Supreme Court has held:

> because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) (emphasis original).

¶ 82 As noted above, the Law of the Land Clause is North Carolina's constitutional equivalent of the Fourteenth Amendment's Due Process Clause. *See Collins*, 169 N.C. at 32[4], 84 S.E. at 1050. Our Supreme Court has read our Law of the Land Clause to provide greater protection than the Due Process Clause of the Fourteenth Amendment. *See In re Meads*, 349 N.C. at 671, 509 S.E.2d at 175 (citation omitted).

¶ 83 As the trial court and we held above, the 28 October 2009 DNA blood sample taken from Defendant and test results retained by the State and CODIS did not violate his rights under the Law of the Land Clause. Because the Law of the Land Clause provides greater protections for North Carolina citizens than the floor of the Due Process Clause, no due process violation occurred here. Defendant's argument is overruled.

¶ 84 Defendant filed a memorandum of additional authority in accordance with Rule 28 of the North Carolina Rules of Appellate Procedure and argued the Supreme Court of the United States decision in *Nelson v. Colorado*, __ U.S. __, 197 L. Ed. 2d 611 (2017) as an alternative ground to uphold the trial court's suppression order of the confirmatory test of Defendant's blood sample. Presuming without deciding, Defendant's blood draw was of similar character as the fines, fees, and restitution at issue in *Nelson*, and Defendant was entitled to its return after the dismissal of his murder conviction, Defendant fails to show any petition for the return of his property (blood).

¶ 85 In rejecting Colorado's statutory scheme as being in violation of Nelson's Due Process rights, the Supreme Court of the United States also held: "[t]o comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." *Id.* at __, 197 L. Ed. 2d at 620. Without petition to return his property, Defendant, unlike in *Nelson*, did not invoke the statutory minimum procedure. Defendant did not argue this basis before the trial court and his failure to request the return of his blood as an exaction of his invalidated conviction prevents us from considering the matter as a violation of his federal Due Process rights. Defendant's argument is dismissed.

VII. Coercion

¶ 86 **[5]** Defendant argues this Court should affirm the trial court's order suppressing the DNA sample because his confession was obtained by coercion by Detective Leathers and that Detective Leathers committed

perjury during Defendant's trial. Defendant asserts the exclusionary rule mandates suppression because the confession was fruit of the poisonous tree.

¶ 87 The "fruit of the poisonous tree doctrine" provides for application of the exclusionary rule "[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) (citations omitted). However, the Supreme Court of the United States has held: "while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." *Murray v. United States*, 487 U.S. 533, 542, 101 L. Ed. 2d 472, 483 (1988). This "independent source doctrine" is an exception to the exclusionary rule when "a later, lawful seizure is genuinely independent of an earlier, tainted one." *Id.* "[T]he independent source doctrine provides that evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

¶ 88 Neither the trial judge, jury, the original Supreme Court's unanimous opinion, the Commission, nor the three-superior court judge panel found any misconduct by Detective Leathers. The basis for the finding of innocence was the testimony by Joseph Perry, who waited thirty-seven years, and until after the deaths of his co-defendant, Willis, and Detective Leathers, to assert his exculpation of Defendant. The three-judge panel's ruling is not based upon an assertion of a finding of fruit of the poisonous tree.

¶ 89 Defendant has made no showing to support any coercion by Detective Leathers. As an alternative basis to dismiss his claim, Defendant provided a version of his confession to Agent Momier and Detective Tony Roop on 14 December 1975. This independent source of Defendant's confession is apart from any alleged coercion of Defendant by Detective Leathers. This independent source prevents the application of the exclusionary rule. Because Defendant's confessions and the subsequent evidence were not fruit of the poisonous tree, we need not address the State's attenuation argument, which is unlikely to occur on remand. Defendant's argument is without merit and dismissed.

VIII. Warrantless Search

¶ 90 **[6]** Defendant argues the DNA profile created from his 28 October 2009 sample constituted a warrantless search conducted without exigent cir-

cumstances. We review the applicability of the Fourth Amendment to Defendant's arguments.

¶ 91 "The Fourth Amendment to the United States Constitution protects individuals 'against unreasonable searches and seizures[.]' " *McKinney*, 361 N.C. at 57, 637 S.E.2d at 871 (quoting U.S. Const. amend. IV). "The Fourth Amendment protects against governmental invasions into a person's legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citing *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 226-27 (1979)). "Generally, a warrant is required for every search and seizure, with particular exceptions." *State v. Armstrong*, 236 N.C. App. 130, 132, 762 S.E.2d 641, 643 (2014) (citations omitted).

¶ 92 "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States v. Ross*, 456 U.S. 798, 825, 72 L. Ed. 2d 572, 594 (1982) (citations and internal quotation marks omitted). "Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police." *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 585 (1967) (citations and internal quotation marks omitted).

¶ 93 In *Maryland v. King*, the Supreme Court of the United States reviewed a Fourth Amendment challenge to a Maryland statute authorizing the collection of DNA samples taken upon booking after arrest for certain crimes. *King*, 569 U.S. at 441, 186 L. Ed. 2d at 16. The defendant was arrested for both first and second-degree assault. Upon booking, his cheek was swabbed to obtain a DNA sample. *Id.* at 440, 186 L. Ed. 2d at 16. The sample matched evidence collected from a rape, which had occurred six years earlier. *Id.* at 441, 186 L. Ed. 2d at 16. The defendant was charged, tried, and convicted of the prior rape. *Id.*

¶ 94 The Supreme Court upheld the conviction with the admitted DNA evidence and held the defendant's "expectations of privacy were not offended by the minor intrusion of a brief swab of his cheek." *Id.* at 465, 186 L. Ed. 2d at 32. The Court held defendant's expectation of privacy was not violated in the "context of a valid arrest supported by probable cause."

Id. The DNA identification swab and the sample obtained was held to be a reasonable search as a part of the "routine booking procedure" for the State's interest in properly identifying an arrestee but also for the court to make "informed decisions concerning pretrial custody." *Id*.

1. Nature of Intrusion

¶ 95 Defendant was in the class of offenders sentenced under Fair Sentencing pursuant to N.C. Gen. Stat. § 14-2 between 1975 and 1978 and potentially impacted by this Court's decision in *State v. Bowden*. In preparation for possible early release, along with all potentially affected inmates, a blood sample was taken from Defendant without recorded objection on 28 October 2009 by DAC. This draw was taken pursuant to authority in N.C. Gen. Stat. § 15A-266.4 (2009). From this lawfully obtained sample, Defendant's DNA profile was created and sent to CODIS.

¶ 96 Forensic DNA testing analyzes certain predetermined parts within the chromosomes contained inside of the nucleus of all human cells. The Supreme Court of the United States explains the process as:

> The DNA material in chromosomes is composed of "coding" and "noncoding" regions. The coding regions are known as *genes* and contain the information necessary for a cell to make proteins. . . . Non-protein-coding regions . . . are not related directly to making proteins, [and] have been referred to as "junk" DNA. The adjective "junk" may mislead the layperson, for in fact this is the DNA region used with near certainty to identify a person.
>
> The term apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.
>
> Many of the patterns found in DNA are shared among all people, so forensic analysis focuses on repeated DNA sequences scattered throughout the human genome, known as "short tandem repeats" (STRs). The alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known as "alleles," and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual.

King, 569 U.S. at 442-43, 186 L. Ed. 2d at 17 (citations and internal quotation marks omitted).

¶ 97 CODIS is a national DNA database maintained by the FBI with all fifty states and federal law enforcement agencies participating. *Id.* at 444-45, 186 L. Ed. 2d at 18. CODIS collects DNA profiles from local laboratories. The profiles collected include "arrestees, convicted offenders, and forensic evidence found at crime scenes." *Id.* at 445, 186 L. Ed. 2d at 18-19.

¶ 98 CODIS provides for the "standardization of the points of comparison in DNA analysis," basing its database "on 13 loci at which the STR alleles are noted and compared." *Id.* As stated by the Supreme Court, the "junk" nomenclature used may "mislead the layman," but it is important to note the 13 CODIS loci "are from the nonprotein coding junk regions of DNA, and are not known to have any association with genetic disease or any other genetic predisposition." *Id.* (citation and internal quotation marks omitted).

¶ 99 The non-consensual swab of the defendant's cheek constituted a search. *Id.* at 446, 186 L. Ed. 2d at 19 ("Virtually any intrusio[n] into the human body, will work an invasion of 'cherished personal security' that is subject to constitutional scrutiny[.]" (internal citations and quotation marks omitted)). The Supreme Court held: "A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no surgical intrusion beneath the skin." *Id.* at 446, 186 L. Ed. 2d at 20 (citation and internal quotation marks omitted).

¶ 100 Here, Defendant had his DNA sample collected by a "venipuncture to draw blood." *See id.* The Supreme Court of the United States stated this procedure is a more invasive intrusion into personal security and freedom from unreasonable searches and seizures than taking a buccal swab for Fourth Amendment purposes. *Id.* While a blood draw is a further intrusion into personal security than the sample taken in *King*, this distinction alone does not *per se* make the intrusion unreasonable.

¶ 101 In *State v. Barkley*, 144 N.C. App. 514, 516, 551 S.E.2d 131, 133 (2001), this Court examined a blood draw from a suspect in a previous murder investigation, who had been arrested on a habitual felon indictment and required medical attention for an unrelated injury. Law enforcement officers had approached the defendant to provide a sample multiple times, while he was in-patient at the medical facility and after

the immediate medical issue was resolved. The defendant relented and allowed police to draw a blood sample. *Id.* at 517, 551 S.E.2d at 133. The sample matched DNA evidence from a rape, which had occurred several months earlier. *Id.* at 517, 551 S.E.2d at 134. This Court found no error holding:

> It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person.

Id. at 519, 551 S.E.2d at 135 (citation omitted).

¶ 102 The Supreme Court of the United States recognized the intrusion from a blood draw is greater than that of a fingerprint or buccal swab, but held the intrusion of an intravenous puncture was "not significant, since such tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625, 103 L. Ed. 2d 639, 665 (1989).

2. Defendant's Status

¶ 103 At the time of the 28 October 2009 blood draw, Defendant was incarcerated in the custody of DAC under a life sentence for the first-degree felony murder of Bullock. "[G]iven the realities of institutional confinement, any reasonable expectation of privacy that [a prisoner] retained necessarily would be of a diminished scope." *Bell v. Wolfish*, 441 U.S. 520, 557, 60 L. Ed. 2d 447, 480 (1979) (citation omitted). Unlike the defendant in *Bell*, Defendant was not a pretrial detainee, with the presumption of innocence, but rather someone under final conviction and serving a life sentence entered upon a unanimous jury's verdict, which was reviewed and upheld by a unanimous Supreme Court of North Carolina. *Womble*, 292 N.C. at 461, 233 S.E.2d at 538.

¶ 104 Inmates do not forfeit all Fourth Amendment protections while incarcerated. *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 41 L. Ed. 2d 935, 950-51 (1974). "[T]he threshold determination of whether a prisoner's expectation is 'legitimate' or 'reasonable' and thus deserving of the

Fourth Amendment's protection, necessarily entails a balancing of the security interest of the penal institution against the privacy interest of the prisoner[.]" *Wiley*, 355 N.C. at 603, 565 S.E.2d at 32 (citation omitted). In *Wiley*, the nature of the intrusion was screening of the contents of a letter. *Id*. The issues in *Bell* involved searches for contraband and weapons inside a facility. *Bell*, 441 U.S. at 557, 60 L. Ed. 2d at 480.

¶ 105 Unlike these cases, the search of Defendant involved a draw of an intravenous blood sample in preparation for potential release from prison pursuant to N.C. Gen. Stat. § 15A-266.4. Defendant was not singled out for individualized suspicion or disparate treatment, but was within a class of inmates to be potentially released from custody prior to the expiration of their sentences. This intrusion is weighted against the government's interest in preserving an identification record of convicted felons for resolving past or future crimes. *Wiley*, 355 N.C. at 603, 565 S.E.2d at 32. Here, the governmental interests outweigh an individual's right to privacy while incarcerated and upon release.

¶ 106 As we previously held, the 28 October 2009 sample drawn from Defendant did not violate Defendant's Fourth Amendment rights. The sample and profile were lawfully retained in the State Crime Lab's control. Defendant does not have a privacy claim or an unreasonable search and seizure argument because, as the trial court also found, the sample was obtained and retained lawfully. *See Barkley*, 144 N.C. App. at 519, 551 S.E.2d at 135 (citation omitted). The confirmatory analysis of Defendant's profile did not violate Defendant's rights. Defendant's argument is overruled.

IX. Ineffective Assistance of Counsel

¶ 107 **[7]** Defendant argues his counsel's assistance before the Commission and the three-judge panel constituted ineffective assistance of counsel by failing to petition for expungement of his blood sample and results under N.C. Gen. Stat. § 15A-266.4. Defendant seeks the exclusion of the DNA profile as the remedy for the alleged ineffective assistance of counsel.

A. Standard of Review

¶ 108 In order to show ineffective assistance of counsel, a defendant must satisfy the two-pronged test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The *Strickland* test for ineffective assistance of counsel has also been adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

¶ 109 To show ineffective assistance, Defendant "must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693).

¶ 110 Pursuant to *Strickland*,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

¶ 111 When reviewing an ineffective assistance of counsel claim, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). Our Supreme Court stated it "ordinarily do[es] not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Formal Inquiry

¶ 112 The State argues no constitutional right to an attorney exists in state post-conviction proceedings; therefore, a petitioner cannot claim ineffective assistance of counsel pursuant to the Sixth Amendment. The State relies on *Coleman v. Thomas*, 501 U.S. 722, 752, 115 L. Ed. 2d 640, 671 (1991) and *Davila v. Davis*, __ U.S. __, __, 198 L. Ed. 2d 603, 612 (2017). In *Davila*, the Supreme Court of the United States reaffirmed *Coleman's* holding that where an attorney committed an error in a state court post-conviction proceeding, and where the Sixth Amendment does not guarantee a right to counsel, the error cannot supply the cause necessary to excuse a procedural default to allow review. *Id.* at __, 198 L. Ed. 2d at 612.

¶ 113 Defendant parallels this issue to a criminal defense attorney who does not advise their client on potential collateral consequences of a criminal conviction prior to pleading guilty. *See Padilla v. Kentucky*, 559 U.S. 356, 368-69, 176 L. Ed. 2d 284, 295 (2010). However, counsel's failure to seek expunction is not a collateral consequence.

¶ 114 Defendant had a statutory right to counsel for the "formal inquiry" by the Commission and at the hearing before the three-judge panel. *See* N.C. Gen. Stat. §§ 15A-1467(b) and 1469(d). Defendant's counsel sought a finding of actual innocence at the Commission and dismissal before the three-judge panel.

¶ 115 A defendant cannot plead guilty without being informed of collateral consequences that might affect their taking the plea. *Padilla*, 559 U.S. at 371, 176 L. Ed. 2d at 297. In *Padilla*, the defendant was incorrectly told he "did not have to worry about immigration status since he had been in country so long." *Id*. at 359, 176 L. Ed. 2d at 290. The drug charges he pleaded guilty to made his deportation mandatory. *Id*.

¶ 116 As established above, Defendant did not have a statutory right to expungement under either N.C. Gen. Stat. §§ 15A-146 or 15A-148. Defendant's counsel does not have a duty to pursue a remedy unavailable at law. Under *Strickland*, Defendant's counsel's performance cannot be "deficient" for not pursuing a claim that is unavailable to him. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

¶ 117 Defendant's counsel at the two proceedings was seeking to establish his client's innocence and dismissal of his conviction. This counsel was not retained to pursue any further claim or action by Defendant, including a claim under N.C. Gen. Stat. § 148-82 (2019). The trial court properly denied Defendant's ineffective assistance of counsel claim. *Davila*, __ U.S. at __, 198 L. Ed. 2d at 612. Defendant's argument is overruled.

X. Inevitable Discovery

¶ 118 **[8]** The State argues even if the 28 October 2009 sample was unconstitutionally obtained from Defendant, it would be admissible under the inevitable discovery doctrine because the State had focused their investigation on Defendant. The State asserts the trial court erred in concluding the Todd homicide investigation had "stalled" and denied the State the opportunity to put on additional evidence towards their alternative theory for admission under inevitable discovery at the trial court.

¶ 119 The Supreme Court of the United States and the North Carolina Supreme Court have recognized and adopted the inevitable discovery exception to the Fourth Amendment's exclusionary rule. *Nix v. Williams*,

467 U.S. 431, 448, 81 L. Ed. 2d 377, 390 (1984); *State v. Garner*, 331 N.C. 491, 506-07 417 S.E.2d 502, 510 (1992). The inevitable discovery doctrine prevents the application of the exclusionary rule where:

> evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action.

Pope, 333 N.C. at 114, 423 S.E.2d at 744.

¶ 120 The State points to Detective Johnson's testimony that the investigation would have inevitably focused on Defendant, regardless of the CODIS match. Detective Johnson testified the investigation into Todd's murder would have focused on Defendant because: (1) Defendant and Todd both lived in the Creekside Apartments; (2) Defendant told investigators he knew Todd, lent her cigarettes, and gave her rides to the grocery store; (3) Defendant also told officers he had cut off contact when Todd told his then girlfriend, Myrie, he "was trying to get with her"; (4) the anonymous call to Pittsboro Police reporting Defendant had killed Todd because Todd had "confronted [Defendant] for hitting on her . . . , but just trying to have a relationship with her" and Defendant had "got upset and said that he would get Ms. Todd for telling [Myrie] on him"; and, (5) Todd's stepfather had already told investigators that Todd had told him, shortly before she was murdered, "there was a gentleman . . . [in] the apartment complex that had been harassing her and that was trying to - - to hit on her and it was just causing her some distress."

¶ 121 The trial court did not allow the State to present Detective Johnson's testimony to establish police had responded to disturbances or assaults involving Defendant and Myrie at least six times between March 2017 and August 2017. The trial court reasoned the Greensboro Police Department incident reports did not come to Detective Johnson's attention until after the State Lab told police about the CODIS hit and the retest to verify the match.

¶ 122 Pittsboro Police initially focused on Thel Riley as their suspect, but he was ruled out by DNA analysis. It was error for the trial court to deny the State the opportunity to present evidence to satisfy their burden to prove inevitable discovery. Nowhere does our precedent impose a temporal component to evidence subject to inevitable discovery, only that the evidence "would have been inevitably discovered" by police.

XI. Conclusion

¶ 123 The trial court correctly concluded the 28 October 2009 sample was lawfully taken and retained and was not an unreasonable search in violation of the Fourth Amendment. Defendant was not entitled to expulsion and expunction under either N.C. Gen. Stat. §§ 15A-146 and 15A-148. N.C. Gen. Stat. § 15A-148 places the burden of petitioning for expunction on the movant, and not *ipso facto* upon the State.

¶ 124 Presuming the constitutionally of the statute and Defendant's burden to show prejudice, the lack of automatic expunction does not trigger or place "an unconstitutional burden on the defendant" in violation of the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution. North Carolina's lack of automatic expunction in the statute also does constitute a procedural or substantive Due Process violation. The trial court erred in suppressing Defendant's 28 October 2009 blood sample and DNA profile therefrom uploaded into CODIS.

¶ 125 The 28 October 2009 sample was not "fruit of the poisonous tree" from Detective Leather's interrogation and Defendant's confessions. The confirmatory analysis and the subsequent search of the blood sample taken 24 January 2018 were not a warrantless search lacking exigent circumstances. The trial court's ordered suppression on the violation of the Law of the Land Clause is erroneous and reversed. This matter is remanded for trial. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and GORE concur.

WEST v. HOYLE'S TIRE & AXLE, LLC

[277 N.C. App. 196, 2021-NCCOA-151]

SHARON CASH WEST, Wife of Keith West (Decedent), JESSICA WEST HAYES, Adult Daughter of Decedent, RAYMOND WEST, Adult Son of Decedent, and SHANNON STOCKS, Plaintiffs

v.

HOYLE'S TIRE & AXLE, LLC, Employer, and TRAVELERS INDEMNITY COMPANY, Carrier, Defendants

No. COA20-470

Filed 20 April 2021

1. Workers' Compensation—death benefits—insurer made full payment to family—appeal by non-family pending—defendants' request to be discharged from case properly denied

In a workers' compensation case involving death benefits, the Industrial Commission properly denied a request by decedent's employer and its insurance carrier (collectively, defendants) to be dismissed from the case after they made full payment to decedent's family, where the payment was made after and in full knowledge of an appeal by decedent's romantic partner from the denial of her claim. Nothing in the Workers' Compensation Act would have required defendants to prematurely pay their obligation while the appeal was still pending, and they were not entitled to discharge pursuant to N.C.G.S. § 97-48(c).

2. Attorney Fees—workers' compensation death benefits—denial of claim—sanctions sought—claim made in good faith

In a workers' compensation case involving death benefits, where decedent's family requested attorneys' fees (pursuant to N.C.G.S. § 97-88.1) as sanctions after a claim by decedent's romantic partner to share in the benefits was denied, the Industrial Commission properly denied the request for sanctions. Although the partner's claim of factual dependence made under N.C.G.S. § 97-39 could not prevail based on case law interpreting that statute, there was competent evidence to support the Commission's determination that the claim was made in a good faith effort to overturn existing law and did not constitute unfounded litigiousness.

3. Constitutional Law—equal protection—workers' compensation death benefits—marital status—controlling precedent

In a workers' compensation case involving death benefits, where the North Carolina Supreme Court previously interpreted N.C.G.S. § 97-39 as excluding an unmarried woman from receiving compensation (in *Fields v. Hollowell & Hollowell*, 238 N.C. 614 (1953)), the

Court of Appeals was without authority to consider the constitutional argument made by decedent's romantic partner that she was deprived of her equal protection rights on the basis of her marital status when she was denied a share of the death benefits because she and decedent were not married.

Appeal by plaintiffs and defendants from opinion and award entered 8 November 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 April 2021.

Teague Campbell Dennis & Gorham, LLP by Luke A. West, for Defendants-Appellants, Cross-Appellees.

Hemmings & Stevens, PLLC by Kelly A. Stevens, for Plaintiff-Appellee, Cross-Appellant Jessica West Hayes.

Cloninger Law Offices, PLLC by D. Randall Cloninger, for Plaintiff-Appellee, Cross-Appellant Raymond West.

Amy Berry Law, PA by Amy Berry, for Plaintiff-Appellee, Cross-Appellant Sharon Cash West.

Mast Mast Johnson Wells & Trimyer, by Charles Mast, for Plaintiff-Appellee, Cross-Appellant Shannon Stocks.

CARPENTER, Judge.

I. Factual & Procedural Background

¶ 1 Keith West ("Decedent") was employed by Hoyle's Tire & Axle at the time of his death and was killed in a work-related accident. Defendant-Employer Hoyle's Tire & Axle, LLC ("Hoyle's Tire") and its workers' compensation insurance carrier Defendant-Carrier Travelers Indemnity Company ("Travelers") (collectively, "Defendants") admitted compensability for death benefits. Decedent's adult daughter, Plaintiff Jessica West Hayes ("Plaintiff Hayes"), Decedent's adult son Raymond West ("Plaintiff West"), Decedent's estranged wife Sharon Cash West ("Plaintiff Cash West"), (collectively, the "Family Members"), and Decedent's alleged girlfriend or fiancée Shannon Stocks ("Plaintiff Stocks") (collectively, "Plaintiffs") all asserted death benefit claims under the North Carolina Workers' Compensation Act. Although Plaintiff Stocks admits she was not married to Decedent, Plaintiff Stocks claims

she was cohabitating with and partially dependent upon Decedent for certain expenses.

¶ 2 On 2 April 2018 Defendants filed a Form 33 request for hearing in this matter seeking "to determine the proper beneficiaries in this claim." On 22 January 2019, Plaintiff Hayes filed a motion to dismiss and for attorneys' fees and sanctions. Plaintiffs West and Cash West joined the motion. The motion to dismiss and for attorneys' fees and sanctions requested dismissal of Plaintiff Stocks' claim to benefits, averring Plaintiff Stocks had no standing to make a claim pursuant to N.C. Gen. Stat. § 97-39 (2019). The 22 January 2019 motion also sought "costs, including reasonable attorney fees and sanctions pursuant to N.C. Gen. Stat. § 97-88.1 for [Plaintiff Stocks'] making and defending a claim without reasonable grounds." On 6 February 2019, the matter was set before Deputy Commissioner J. Brad Donovan ("Deputy Commissioner Donovan") for a motions hearing with all parties appearing through counsel.

¶ 3 At the 6 February 2019 hearing, Deputy Commissioner Donovan noted the entry of a pretrial order that contained stipulations and then read the stipulations into the record. Although the Family Members' 22 January 2019 motion to dismiss and for attorneys' fees and sanctions averred Plaintiff Stocks had no standing to make a claim and "[did] not qualify as a person within the purview of the Workers' Compensation Act who can make a claim," the stipulations entered into by the parties in connection to the 6 February 2019 hearing included: "[t]he parties are properly before the Commission" and "[t]he Commission has jurisdiction of the parties and the subject matter of the claim."

¶ 4 At the 6 February hearing, Deputy Commissioner Donovan granted the Family Members' motion to dismiss and motion for attorneys' fees and sanctions. Deputy Commissioner Donovan also requested counsel representing the Family Members submit an accounting of the time they spent defending Plaintiff Stocks' claim for consideration under N.C. Gen. Stat § 97-88.1. Deputy Commissioner Donovan further indicated the Family Members had reached an agreement and directed them to submit a consent order. On 6 February 2019, after the hearing, Plaintiff Stocks, in response to the motion for attorneys' fees, filed a motion for an offer of proof seeking admission of all discovery responses produced in the matter to date, ostensibly to illustrate the amount of time spent by the parties on discovery.

¶ 5 On 15 February 2019, Deputy Commissioner Donovan filed an order dismissing Plaintiff Stocks' claim and denying her motion for an offer

of proof. The 15 February Order stated, "[t]he parties have indicated ... they have reached an agreement regarding the distribution of funds in this matter." On 22 February 2019, Deputy Commissioner Donovan entered an order executed and submitted by Defendants and the Family Members as previously directed ("Consent Order"). The terms of the Consent Order divided equally Decedent's workers' compensation death benefits among the Family Members. A full evidentiary hearing was not held to establish the underlying facts of the matter.

¶ 6 Plaintiff Stocks filed appeals on 20 February 2019 and 27 February 2019 from all three of Deputy Commissioner Donovan's orders, including the Consent Order. Notwithstanding Plaintiffs Stocks' pending appeals, on 8 March 2019, Defendants paid the death benefits to the Family Members pursuant to the Consent Order. Thus, Defendants paid the death benefits knowing Plaintiff Stocks' appeals were pending with the Full Commission.

¶ 7 On 10 July 2019, the case was heard before the Full Commission. On 8 November 2019, a divided Full Commission issued its opinion and award. The majority found Defendants had not met their burden to be dismissed from the case because they "were aware that Plaintiff Stocks had appealed Deputy Commissioner Donovan's Orders and that these appeals were pending before the Full Commission when Defendants paid the benefits to the other claimants." In denying Defendants' motion, the Full Commission majority held:

> Defendants' interest in avoiding the additional litigation engendered by appellate review does not outweigh Plaintiff Stocks' right to appellate review of the Deputy Commissioner's decision. Allowing Defendants to discharge their obligation and be dismissed from the case, notwithstanding the pending appeal, would render Plaintiffs' issues on appeal moot and undermine Plaintiffs' right to appeal to the North Carolina Court of Appeals by relegating such appeal to a mere request for an advisory opinion. In the present case, Defendants prematurely paid the death benefits to certain Plaintiffs knowing that the issue of Plaintiff Stocks' entitlement to benefits under the Act was pending review by the Full Commission and is subject to potential further appeal to the higher courts. Thus, Defendants' Motion to Dismiss Defendants is DENIED.

¶ 8 On the issue of Plaintiff Stocks' standing, in its conclusion of law Number 2, the Full Commission concluded *Fields v. Hollowell* was binding on the Commission, and that because no evidentiary hearing was held, the issue of whether Plaintiff Stocks should have the opportunity to prove factual dependence was a question of law. *See Fields v. Hollowell & Hollowell*, 238 N.C. 614, 78 S.E.2d 740 (1953).[1] Accordingly, the Full Commission concluded that under *Fields*, Plaintiff Stocks could not possibly be a factual dependent of Decedent under N.C. Gen. Stat. § 97-39.

¶ 9 Deputy Commissioner Loutit dissented from the majority only on its ruling on Defendants' motion to dismiss and would have dismissed and discharged Defendants from further obligations in the matter. He stated:

> In this tragic matter, defendants accurately identified and correctly compensated all claimants in accordance with controlling and well-established North Carolina law and N.C. Gen. Stat. §§ 97-39 and 97-48. Defendants tendered payment in good faith to proper dependents and heirs of the decedent in accordance with a Consent Order filed on February 22, 2019. Under the long-standing laws of this state with respect to dependency, there has never been a genuine issue as to the proper dependents and payees. Specifically, under *Fields v. Hollowell* . . . , plaintiff Stocks currently cannot possibly be a factual dependent of decedent-employee . . . .
>
> Although any party or attorney may express aspirational interests in using a legal vehicle such as the tragic instant matter to change laws in the hopes that the judicial system may ultimately embrace her cause, these intentions should not delay the swift, certain, and accurate compensation of legal claimants as contemplated by the Workers' Compensation Act currently in full force and effect. (*Id.*).

¶ 10 Between 6 December and 9 December 2019, all parties filed notices of appeal to this Court.

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1. In *Fields v. Hollowell & Hollowell*, the North Carolina Supreme Court held a woman cohabitating with a decedent-employee at the time of his death as his common law wife is not entitled to any compensation or the opportunity to prove factual dependence under N.C. Gen. Stat. § 97-39.

II. Jurisdiction

¶ 11 Jurisdiction lies in this Court as a matter of right over a final judgment from the North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2019).

III. Issues

¶ 12 The issues before this Court are (1) whether the Industrial Commission erred in denying Defendants Hoyle's Tire and Travelers' motion to dismiss; (2) whether the Industrial Commission erred in denying sanctions in the form of attorneys' fees against Plaintiff Stocks pursuant to N.C. Gen. Stat. § 97-88.1; and (3) whether the Industrial Commission erred in dismissing Plaintiff Stocks' claim to death benefits and thereby denied her the equal protection of the law.

IV. Standard of Review

¶ 13 Appeals from the Industrial Commission are reviewed by the Court of Appeals which must determine "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 533 (2000). "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987).

V. Analysis

A. Motion to Dismiss

¶ 14 **[1]** Defendants Hoyle's Tire and Travelers contend the Industrial Commission erred in denying their motion to dismiss because they tendered payment of the full balance of workers' compensation benefits pursuant to the Consent Order in good faith. We disagree.

¶ 15 N.C. Gen. Stat. § 97-48(c) provides,

> (c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them.

N.C. Gen. Stat. § 97-48(c) (2019). Defendants cite the 1955 North Carolina Supreme Court case *Green v. Briley*, which interprets N.C. Gen. Stat. § 97-48(c), and states: "for those who pay [workers' compensation claims] in good faith, a modicum of legal protection against recurring demands is rightly provided." *Green v. Briley*, 242 N.C. 196, 201, 87 S.E.2d 213, 216 (1955). In order to determine whether a party has acted in good faith in a settlement, the court must examine the totality of the circumstances and consideration of all relevant facts. *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 646, 535 S.E.2d 55, 62 (2000).

¶ 16 In *Green*, based upon all evidence before it at the time, the Industrial Commission entered an order directing the payment of workers' compensation death benefits to the mother of the decedent. The evidence before the Commission regarding dependents included: (1) investigative statements obtained by the workers' compensation carrier from the decedent's mother, as well as a family member who was living with the decedent at the time of his death, to the effect the decedent was not married and had no children, and (2) stipulations by the parties the decedent was not married and had no children. The order in *Green* was not appealed. The Supreme Court determined the workers' compensation carrier acted in good faith in paying the dependent mother and was excused from having to make an additional payment to the widow. *Id.* at 201, 87 S.E.2d at 216.

¶ 17 The present case was properly distinguished from *Green* by the Industrial Commission majority's order. The facts and circumstances surrounding Defendants' payment of benefits in the present case are as follows. In the case at bar, a clear dispute existed among the parties regarding Plaintiff Stocks' dependency on Decedent. Further, the orders in the present case regarding Plaintiff Stocks' dependency and payment to the Family Members were appealed by Plaintiff Stocks. Defendants paid the Family Members *after* notice of appeal was filed by Plaintiff Stocks. Defendants acted with notice of Plaintiffs Stocks' appeal.

¶ 18 No statutory language found in the North Carolina Workers' Compensation Act exists to support a conclusion Defendants were required to pay the Family Members in accordance with the Consent Order notwithstanding Plaintiff Stocks' appeal. To the contrary, under N.C. Gen. Stat. § 97-18(e), the "first installment of compensation payable under the terms of an award by the Commission" does not "become due" until "10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner." N.C. Gen. Stat. § 97-18(e) (2019). Such language indicates

Defendants would not have been required to prematurely pay benefits to the Family Members while Plaintiff Stocks' appeal was still pending.

¶ 19 Based on the foregoing, we find competent evidence exists to support the Commission's finding that Defendants did not act in good faith in tendering payment to the Family Members such that they should have been dismissed from suit.

B. Attorneys' Fees

¶ 20 **[2]** Co-Plaintiffs Family Members contend the Industrial Commission erred in denying sanctions in the form of attorneys' fees against Plaintiff Stocks pursuant to N.C. Gen. Stat. § 97-88.1. We disagree.

¶ 21 The Family Members requested attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1, which provides reasonable fees may be awarded if the Industrial Commission "shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground . . . ." This Court has explained the purpose of N.C. Gen. Stat. § 97-88.1 is to "deter stubborn, unfounded litigiousness, which is inharmonious with the 'primary consideration of the Workers' Compensation Act.' " *Sparks v. Mountain Breeze Rest. and Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982) (quoting *Barbour v. State Hosp.*, 213 N.C. 515, 518, 196 S.E. 812, 814 (1938)).

¶ 22 A court may award sanctions when a party violates N.C. Gen. Stat § lA-1, Rule 11 by filing pleadings not well founded in fact and warranted by existing law or a good faith argument for extension, modification, or reversal of the existing law. *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). An award under N.C. Gen. Stat. § 97-88.1 is discretionary according to the Supreme Court of North Carolina, which has held, "the language of [N.C. Gen. Stat §] 97-88.1 clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Commission." *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397, 298 S.E.2d 681, 684 (1983).

¶ 23 The Family Members assert Plaintiff Stocks "brought [her claim] without reasonable ground," entitling the Family Members to attorneys' fees from Plaintiff Stocks pursuant to N.C. Gen. Stat. § 97-88.1. Plaintiff sought the opportunity to prove factual dependence on Decedent under N.C. Gen. Stat. § 97-39, which states in relevant part:

> A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases

> questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident.

N.C. Gen. Stat. § 97-39. The plain text of N.C. Gen. Stat. § 97-39 does not dispose of Plaintiff Stocks' claim, as Plaintiff Stocks could fall into the category of "all other cases," allowing her to prove her factual dependency. Pairing the statute with its interpretation in *Fields*, however, specifically disposes of Plaintiff Stocks' argument she could be entitled to death benefits. In *Fields*, our Supreme Court explained "a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term 'in all other cases.' " *See Fields*, 238 N.C. at 618, 78 S.E.2d at 743. The parties do not dispute the principle of *stare decisis* would operate to bar Plaintiff Stocks' argument regarding her entitlement to benefits. However, the Full Commission considered Plaintiff Stocks' argument a "good faith argument for . . . reversal of the existing law" in *Fields*. We agree. Therefore, we find the Full Commission was not required to order sanctions against Plaintiff Stocks in punishment of those efforts. *See Fields*, 238 N.C. at 614, 78 S.E.2d at 740.

¶ 24 Competent evidence exists in the record to support the Commission's findings of fact, and in turn, conclusion of law that Plaintiff Stocks' pursuit of the issue questioning the interpretation of the language of N.C. Gen. Stat § 97-39 did not reflect "stubborn, unfounded litigiousness," but rather represented a good faith argument to change the precedent set in *Fields*.

C. Equal Protection

¶ 25 **[3]** Plaintiff Stocks argues the Industrial Commission erred in dismissing her claim to death benefits and thereby denied her the equal protection of the law. Plaintiff Stocks contends *Fields*' interpretation of N.C. Gen. Stat § 97-39 impermissibly delineates between classes of individuals based on their marital status. *See Fields*, 238 N.C. at 614, 78 S.E.2d 740.

¶ 26 We are bound by the North Carolina Supreme Court's holding in *Fields*, and are, thus, without authority to revisit it until otherwise ordered to do so by the North Carolina Supreme Court. *See Fields*, 238 N.C. at 614, 78 S.E.2d 740; *see also Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (The Court of Appeals "has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (alterations in original) (quotation marks omitted)).

VI. Conclusion

¶ 29 We find competent evidence exists to support the Industrial Commission's findings that (1) Defendants did not act in good faith in tendering payment to the Family Members such that they should have been dismissed from suit, and (2) it was not required to assess sanctions in the form of attorneys' fees against Plaintiff Stocks. We further hold the Industrial Commission did not err in dismissing Plaintiff Stocks' claim to death benefits, as the Industrial Commission is bound by precedent to disallow an unmarried romantic partner of a decedent the opportunity to establish entitlement to the decedent's death benefits. Therefore, we affirm the decisions of the Industrial Commission.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

JAMES D. CORE, Plaintiff
v.
NORTH CAROLINA DIVISION OF PARKS AND RECREATION, Defendant

No. COA20-249

Filed 20 April 2021

Negligence—failure to warn of hidden danger—contributory negligence—head dive into public lake—dark and shallow water

In a negligence action, where plaintiff injured his spine by diving head-first from a pier into an area of a lake that was only eighteen inches deep, the Industrial Commission's order denying recovery to plaintiff was reversed because its conclusion that plaintiff was contributorily negligent was unsupported by its findings, which were unsupported by competent evidence. The Commission relied on a photograph showing grass visibly growing in the water by the pier, but heard no evidence suggesting the photograph accurately depicted the pier on the day of plaintiff's accident. Moreover, plaintiff acted reasonably where he noted signs advertising the lake as "the perfect place for swimming," saw boats near the lake and swim ladders on the pier's swim platform, and had no reason to know about the lake's high botanic acid content, which darkened the water and made it difficult to judge the lake's depth.

Appeal by Plaintiff from decision and order entered 5 December 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2021.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Miller III, and Lauren R. McAndrew, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for Defendant-Appellee.

WOOD, Judge.

¶ 1 Plaintiff James D. Core ("Plaintiff") appeals a decision and order of the North Carolina Industrial Commission ("the Commission") denying Plaintiff's negligence claim against the North Carolina Division of Parks and Recreation ("Defendant") based on the Commission's conclusion that Plaintiff was contributorily negligent. We reverse and remand.

I. Background

¶ 2 This case returns to the Court a second time. *See Core v. N. Carolina Div. of Parks & Rec.*, No. COA17-1402, 262 N.C. App. 372, 820 S.E.2d 133, 2018 WL 5796289 (2018) (unpublished). On the weekend of October 3-4, 2014, Plaintiff and members of Plaintiff's college fraternity went to Lake Waccamaw State Park ("Lake Waccamaw"), a state park located approximately seventy-five miles south of Fayetteville, North Carolina, for a camping trip. There was no evidence the group used drugs or alcohol during the trip. Lake Waccamaw is owned and operated by Defendant and reaches a depth of approximately twelve feet. Lake Waccamaw is a Carolina Bay Lake and has a very high botanic acid content. A high botanic acid content affects the appearance of the water, making it appear darker and deeper than it actually is and making it very difficult to determine the depth. Lake Waccamaw promotes swimming, boating, and fishing as some of its attractions.

¶ 3 One attraction of Lake Waccamaw is its picnic area pier, which extends 375 feet into the water. The visitor information center at Lake Waccamaw advertises the pier as "the perfect place for swimming and sunbathing." At the end of the pier is a large swim platform, with two metal swim ladders. Although the deepest part of Lake Waccamaw has a depth of twelve feet, the water around the pier only reaches a "maximum depth . . . of about two feet."

¶ 4 On the morning of October 4, 2014, Plaintiff and several members of his fraternity went jogging at Lake Waccamaw. Plaintiff and

a few of his fraternity members decided to explore the 375-foot pier. Then, Plaintiff and Nate Middleton ("Middleton") decided to go swimming. Plaintiff and Middleton testified, "we checked [the water's depth] the day of [Plaintiff's injury], right before we jumped in. We watched the sun rise and the water looked pretty clear and we couldn't see the bottom." Plaintiff and his fraternity members observed the swim ladders on the swimming platform, looked for warning signs, noticed how dark the water appeared, and dropped a rock in the water to see if they could see it hit bottom. The water appeared "very dark," and Plaintiff could not see the bottom. Plaintiff noted the several boats he had seen throughout the park, thinking the lake was deep enough for swimming.

¶ 5 Plaintiff decided to enter the water using a shallow dive, a dive he regularly performed in his experience as a competitive swimmer. Plaintiff got a running start and attempted a shallow dive. Plaintiff immediately struck the ground, and "felt a sharp pain throughout the whole right side of [his] arm," and some "sharp stiffness" in his torso area.

¶ 6 In an incident report prepared after Plaintiff's accident, a park ranger stated the group thought the depth of the water was deeper than the actual depth of the lake at that location. The park ranger also noted "[t]he lake's color [was] also dark due to the botanic acids from the organic matter which makes judging the depth very difficult."

¶ 7 Later, it was determined Plaintiff's cervical spine was broken in three different places. Although Plaintiff recovered, he has a loss of sensation on the right side of his torso and lower right extremity, and weakness in his left hand.

¶ 8 On December 9, 2014, Plaintiff filed this action with the Commission alleging Defendant negligently failed to warn Plaintiff of the hidden danger at Lake Waccamaw. On February 5, 2015, Defendant filed its answer denying negligence and alleging contributory negligence.

¶ 9 In August 2016, Deputy Commissioner Donovan issued an order in favor of Plaintiff, awarding Plaintiff $300,000 in damages. Defendant appealed to the Full Commission, which affirmed that Defendant was negligent, but concluded Plaintiff was contributorily negligent. Deputy Commissioner Tyler Younts ("Deputy Commissioner Younts") filed a dissent, in which he agreed with the majority's conclusion that Defendant was negligent but disagreed with its conclusion that Plaintiff was contributorily negligent. Plaintiff appealed to this Court on September 20, 2017. This Court held "the Commission's conclusions that Plaintiff was contributorily negligent . . . was not supported by sufficient findings of fact." *Core*, 2018 WL 5796289, at *4. The case was then remanded to

the Commission. The Commission amended its order with new findings, relying primarily on photographs identified as Plaintiff's Exhibit 7-1 ("Exhibit 7-1") and Plaintiff's Exhibit 7-11 ("Exhibit 7-11").[1] The Commission relied on Exhibit 7-1, which depicted Plaintiff on a stretcher, with the marshy shoreline of Lake Waccamaw leading to the pier in the background. The Commission relied on Exhibit 7-11, as it "depicts grass visibly growing out of the water some distance out on the pier." The Commission found Defendant negligent, but found Plaintiff contributorily negligent. Exhibit 7-11 was not taken on October 4, 2014, and the Commission heard no evidence suggesting Exhibit 7-11 accurately depicted the pier on the day of Plaintiff's accident. Further, as Deputy Commissioner Younts discussed in his dissent, other photographic exhibits confirm Plaintiff's uncontradicted testimony that the grass was not near the area where Plaintiff entered the water. Plaintiff timely appealed, alleging the Commission erred in relying on Exhibit 7-1 and Exhibit 7-11 in its amended order.

II. Standard of Review

¶ 10 In an appeal from an opinion and award of the Commission, "[t]his Court's review is limited to a consideration of whether there was *any competent evidence* to support the Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law." *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 682, 474 S.E.2d 793, 794 (1996) (citation omitted) (emphasis in original). The Commission's findings of fact are "conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary." *Clawson v. Phill Cline Trucking, Inc.*, 168 N.C. App. 108, 113, 606 S.E.2d 715, 718 (2005) (citation and quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding[s]." *Matter of Collins*, 251 N.C. App. 764, 766, 797 S.E.2d 28, 31 (2017) (citation and internal quotation marks omitted). The Commission's conclusions of law are reviewed *de novo*. *Coffey v. Weyerhaeuser Co.*, 218 N.C. App. 297, 300, 720 S.E.2d 879, 881 (2012) (citing *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004)). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 486, 771 S.E.2d 791, 793-94 (2015) (citation and internal quotation marks omitted).

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1. The parties introduced numerous exhibits at trial. Plaintiff's Exhibit 7 was comprised of eighteen photographs, individually labeled as Plaintiff's Exhibit 7-1 through Plaintiff's Exhibit 7-18.

III. Analysis

¶ 11 In Plaintiff's first appeal ("*Core I*"), Plaintiff argued the Commission erred when it failed to consider the reasonableness of his actions in light of all of the circumstances and any precautions taken by Plaintiff. *Core*, 2018 WL 5796289 at *5; *See also Tyburski v. Stewart*, 204 N.C. App. 540, 544, 694 S.E.2d 422, 425 (2010). Plaintiff further asserted the Commission's conclusion that Plaintiff was contributorily negligent was wholly inconsistent with its conclusion that the water at the end of the pier was a hidden danger, as Plaintiff could not have acted with "knowledge and appreciation, either actual or constructive, of the danger" if the danger were hidden. *See Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951) (citation omitted); *Core*, 2018 WL 5796289, at *4.

¶ 12 "[A party] cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279 (citation omitted). A party can be contributorily negligent without knowledge of the danger of injury which his conduct involves, "if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (citation omitted).

¶ 13 In *Core I*, this Court held "the Commission's conclusion that Plaintiff was contributorily negligent . . . was not supported by sufficient findings of fact" and remanded the case to the Commission for additional findings. *Core*, 2018 WL 5796289, at *4. The Commission failed to evaluate the reasonableness of Plaintiff's actions in light of the facts of the case. *Id.* at *5. The Commission "improperly concluded Plaintiff was contributorily negligent on October 4, 2014 based solely on (1) Plaintiff's admission that he did not 'ascertain the depth of the water at the end of the pier' and (2) Plaintiff's failure to enter the water by using a swim ladder or jumping feet-first" and that "despite concluding Plaintiff lacked actual knowledge of the dangerous condition of shallow water, the Commission made no specific finding(s) as to whether or why the danger should have been obvious to Plaintiff." *Id.* at *10.

¶ 14 The Commission subsequently amended its order making several new findings of fact and revising the negligence portion of its decision to substitute "hidden danger" with "unknown danger." The amended order also removed certain findings of fact relating to Lake Waccamaw's advertisement of the pier, the presence of swim ladders and platforms, and Plaintiff's testimony that he did not have any indication of the water's depth.

¶ 15 Plaintiff argues the Commission exceeded the scope of this Court's remand order when it revised the negligence portion of its order and removed uncontroverted findings of fact from its decision. We agree and hold that the new findings of fact in the Commission's amended order are not supported by competent evidence.

A. The Commission's findings of fact regarding the grass.

¶ 16 On remand, the Commission added the following findings of fact regarding grass growing near the pier:

> 5. Plaintiff's Exhibit # 7-11 depicts grass visibly growing out of the water some distance out on the pier. According to plaintiff, grass was growing out of the water "further toward the end of the pier," "almost at the point where it was becoming a pathway through the marshy grass tree like tree area." A portion of the pier, therefore, did not extend over open water, but around grass, marsh, and trees which are apparent to visitors. Accordingly, the furthest point away from land on the pier was situated less than 375 feet beyond where grass was visible growing out of the water around the pier and apparent to visitors . . . .
>
> . . .
>
> 20. [T]he grass growing out of the water around the pier in relative proximity to the area where plaintiff dove into the lake should have indicated to a reasonable and prudent person that the water was relatively shallow at that location and not safe for diving.

Thus, the Commission relied on Exhibit 7-11, a photograph, to conclude Plaintiff was contributorily negligent when he entered the water. While the Commission "is free to accept or reject" any evidence and has the prerogative to assign greater or lesser weight to particular pieces of evidence when rendering findings of fact, the Commission's findings of fact must be supported by competent evidence. *See Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 723, 294 S.E.2d 743, 745 (1982); *see also Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "Competent evidence is evidence that a reasonable mind would accept as adequate to support the finding[s]." *City of Asheville v. Aly*, 233 N.C. App. 620, 625, 757 S.E.2d 494, 499 (2014) (quoting *In re Adams*, 204 N.C. App. 172, 179, 693 S.E.2d 705, 708 (2010)).

¶ 17 In finding Plaintiff contributorily negligent, the Commission relied on Exhibit 7-11, despite Plaintiff's "uncontroverted testimony that the grass was toward the shallower end of the pier toward the marshy shoreline, not near the end of the pier where Plaintiff dove into the water." Testimony further established that Exhibit 7-11 showed an area about a third of the way down the pier, which would leave approximately 250 feet between where grass was growing out of the water and the end of the pier.

¶ 18 Further, Exhibit 7-11 was not taken on October 4, 2014, and the Commission received no evidence that Exhibit 7-11 depicted the 375-foot pier as it was on October 4, 2014. In fact, Exhibit 7-11 was introduced with numerous other photographs depicting signs at the pier, describing it as "the perfect place for swimming and sunbathing"; swim platforms; swim ladders; the length of the pier; and the view at the end of the pier.

¶ 19 Plaintiff's photographic exhibits were introduced during the park superintendent's testimony, in which he addressed the depth and visibility of the water as a condition that fluctuated. The Commission heard no evidence regarding when or even during which season, or what time of day Exhibit 7-11 was taken. There is no testimony that the photograph actually reflected the condition of the lake at the time of Plaintiff's injury. Thus, the exhibit's depiction is unreliable and insufficient evidence of the appearance of the pier on October 4, 2014. *See Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97-98, 360 S.E.2d 109, 110 (1987) (noting our rules of evidence do not govern the Commission's fact-finding, but courtroom evidentiary rules and principals which embody "competent" evidence govern our review of whether competent evidence supports the Commission's findings).

B. The Commission's finding that "a portion of the pier, therefore, did not extend over open water."

¶ 20 Next, Plaintiff challenges the Commission's finding that "a portion of the pier, therefore, did not extend over open water." The Commission relied on Plaintiff's Exhibit 7-1 and Exhibit 7-11 in making this finding. Exhibit 7-1 depicts Plaintiff on a stretcher on the boardwalk and pathway that leads to the pier. In the background of Exhibit 7-1, the grassy area of Lake Waccamaw's shoreline is visible. As discussed *supra*, Exhibit 7-11 depicts grass growing out of the water near the shoreline. However, there was no evidence Exhibit 7-11 was taken on or reliably depicts the pier as it was on October 4, 2014. We agree with Plaintiff that this finding is not supported by competent evidence.

¶ 21 Lake Waccamaw's visitor center's kiosk and signage describes the pier as "extend[ing] 375 feet into the lake," making it "the perfect place for swimming and sunbathing." The pier has two metal swim ladders and features two swim platforms. There are no warning signs against diving into shallow water.

¶ 22 One of Plaintiff's fraternity members, Michael Murray ("Murray"), described the pier as a "dock," "probably like a football field" in length beyond the picnic area. Murray clarified that the dock was "abnormally long," "after you come down through this [] kind of walkway where there was [] railings . . ." and "woods on each side." In Middleton's deposition testimony, he estimated the length of the pier as being "200 yards." Middleton stated that, when standing on the pier, "you almost felt [] you were in the center of the lake."

¶ 23 Plaintiff testified Exhibit 7-1 was taken "where it was [] becoming a pathway through the marshy grass[-]like tree area" at the beginning of the pier. As Deputy Commissioner Younts noted in his dissent, "the grass was toward the shallower end of the pier toward the marshy shoreline, not near the end of the pier where Plaintiff dove into the water . . . . [T]he photographs confirm Plaintiff's testimony that the grass was not near the area Plaintiff entered the water."

¶ 24 Considering the uncontroverted nature of Middleton, Murray, and Plaintiff's testimony that Exhibit 7-1 depicted the area leading to the pier, we hold the Commission's finding of fact is not supported by competent evidence. Exhibit 7-11 is unreliable and insufficient evidence of the appearance of the pier on the day of Plaintiff's injury. There was substantial testimony describing the length of the pier, which led Plaintiff to believe the water at the end of the pier was deep enough for swimming.

C. The Commission's finding that the absence of a diving board or docking facilities and presence of swim ladders should have indicated the depth of the water.

¶ 25 The last sentence of the Commission's finding of fact 5 states that, "Plaintiff's Exhibits #7-11 do not show boats docked anywhere at the pier, and do not show any mooring equipment or cleats indicating docking was possible for boats." Finding of fact 20 states

> the absence of a diving board, docking facilities, or any other structure designed to accommodate the use of watercraft, combined with the presence of ladders leading down into the water, should have further indicated to a reasonable and prudent person that,

> although it may have been possible to swim, the water surrounding the pier was too shallow for diving."

Plaintiff contends this finding is not supported by competent evidence, as the Commission heard no testimony concerning the absence of a diving board or docking facilities at the 375-foot pier. Plaintiff also contends that the water does not have to be deep enough for boating in order to be deep enough for swimming and diving. We agree. While the presence of docking facilities may indicate the water is deep enough for boating, it is unreasonable to presume that the presence of docking facilities and boats are necessary in order to indicate that an area is safe for swimming and diving. A reasonable and prudent person likely would not dive next to a boat ramp. Moreover, the Commission's finding ignores Plaintiff's uncontroverted testimony that he saw boats throughout the park.

¶ 26 Plaintiff was not attempting a swan dive, which he testified is the type of dive that is performed from a diving board into deeper water. Rather, Plaintiff performed a shallow dive, which he could do safely in only three feet of water. The Commission's acknowledgment that the presence of swim ladders may have been an indication of depth is consistent with the evidence presented before it. The pier was self-described as the "perfect place for swimming," and Plaintiff did not "think you could swim in a foot and a half of water." Although a warning sign advises of specific dangers from aquatic wildlife and mussel shells, it does not inform visitors that the "perfect place for swimming" is only eighteen inches deep. The Commission's finding is therefore not "evidence that a reasonable mind might accept as adequate to support the finding" Plaintiff was contributorily negligent. *See Aly*, 233 N.C. App. at 625, 757 S.E.2d at 499 (citation omitted).

D. The Commission's finding regarding the appearance of the water.

¶ 27 Next, Plaintiff challenges the Commission's findings of fact regarding the appearance of the water. Finding of fact 16 states that "throwing rocks into the water was not a reasonable way to ascertain depth, as the rocks quickly disappeared in the opaque water." Finding of fact 21 states

> The Full Commission finds that the water surrounding the pier on the date of the incident was too dark to allow plaintiff to see the bottom of the lake. Nevertheless, despite having previously observed the opacity of the water, and despite having some period of time for reflection and an opportunity to

> investigate prior to entering head-first into the lake, plaintiff acknowledged he did not take any steps on his own to ascertain the depth of the lake water, but merely "assum[ed]" it was deep enough to allow for diving . . . . The Full Commission finds that the dark lake water present at the end of the pier should have indicated to a reasonable and prudent person that determining the depth of the water was difficult and would require further investigation before performing a dive under the circumstances. Accordingly, plaintiff's conduct in ignoring this obvious warning sign and diving into unknown depths of the lake water was not reasonable, and plaintiff failed to exercise such care for his own safety as a reasonably careful and prudent person would have exercised under similar circumstances.

¶ 28 Although the evidence in this case demonstrates that, at the time of Plaintiff's injury, the water was "too dark" to ascertain its depth, we hold the Commission's finding that it would indicate to a reasonable person the need for further investigation is unsupported by the evidence in this case. We find Deputy Commissioner Younts's dissent to be compelling.

¶ 29 As Deputy Commissioner Younts discussed, "a reasonably prudent person would just as soon regard the inability to see the bottom of the lake as an indicator that the lakebed lay greater than eighteen inches beneath the surface of the water, since visibility tends to decrease as depth increases in most natural bodies of water in North Carolina." However, we note the portion of the Commission's finding regarding whether Plaintiff acted reasonably is more appropriately considered to be a conclusion of law. " 'A conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties." *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (citation omitted). "[A]ny determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law." *Id.* A finding of fact "that is essentially a conclusion of law . . . will be treated as a conclusion of law" on appeal. *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (citation and alterations omitted). Finding of fact 21 is more aptly considered a conclusion of law, as the Commission found Plaintiff acted unreasonably and failed to exercise the appropriate standard of care before he entered the water of Lake Waccamaw. Therefore, we review finding of fact 21 *de novo*. *See Coffey*, 218 N.C. App. at 300, 720 S.E.2d at 881.

¶ 30 With regard to Plaintiff and his fraternity members throwing rocks into the lake, "while this would not give an exact depth, one would reasonably expect that if the water was only eighteen inches deep, the rocks could be visible going to the bottom, thereby indicating that the water might be too shallow to dive." In addition to Deputy Commissioner Younts' compelling reasoning, we note the Commission heard Plaintiff's uncontradicted testimony that he looked down into the water and observed it appeared dark and deep and Middleton's testimony that the water "looked pretty clear and we couldn't see the bottom." The Commission acknowledged the park ranger's investigation revealed that all of the individuals on the pier that day believed the water to be deep due to its dark appearance. From his eight years of experience working at Lake Waccamaw, the park ranger testified the botanic acids caused the water to appear darker and made it difficult to determine depth. The park superintendent supported this testimony, noting that under certain conditions, even he would be unable to distinguish the shallow depth of the water at the pier from the much deeper water at the Big Creek boat ramp. Indeed, the superintendent admitted that the depth and visibility of the water was a condition that could fluctuate from day to day, or even hour to hour.

¶ 31 The evidence presented in this case established Plaintiff did not know and had no reason to know that the water was much shallower than it appeared. Plaintiff was not required "to shape his behavior by circumstances of which he is justifiably ignorant." *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279. Plaintiff looked for warning signs, noted that the pier was the "perfect place for swimming," and saw the presence of boats throughout the park and swim ladders on the pier's swim platform before entering the water. Therefore, his actions could not be said to be unreasonable, and there is no evidence to support a finding that Plaintiff should have known about Lake Waccamaw's botanic acid level.

E. The Commission's findings regarding the "open" and "apparent" indications of the danger of Lake Waccamaw's shallow water.

¶ 32 Lastly, Plaintiff contends the Commission's findings regarding his failure to check the depth of the water and enter the water using another available means were not reasonable in light of the "obvious" and "apparent" indications of the danger of the lake's shallow water. We agree with Plaintiff's contention that the Commission's findings that the danger of the shallow water was "obvious" and "apparent" are not supported by competent evidence based on our discussion *supra*. Thus, the Commission's findings that Plaintiff's actions were not reasonable be-

cause of these allegedly "obvious" and "apparent" indications of danger are not supported by competent evidence.

F. The Commission's conclusion that Plaintiff was contributorily negligent.

¶ 33 Plaintiff's last argument on appeal challenges the Commission's conclusion of law that he was contributorily negligent. Specifically, the Commission's conclusion of law 13 states

> In this case, based on its findings that plaintiff failed to act as a reasonable and prudent person under the circumstances in that he ignored obvious indications that the water was shallow, ignored the fact that he could not see the bottom of the lake, failed to take steps to ascertain the depth of the water surrounding the pier, and failed to utilize a more reasonable method of entering the water, all while possessing knowledge that diving into shallow water could be dangerous, the Full Commission concludes that plaintiff was contributorily negligent by failing to exercise such care for his own safety as a reasonably careful and prudent person would have used under similar circumstances, and that his negligence was a proximate cause of the injuries he suffered on October 4, 2014. The Full Commission further concludes that even if plaintiff did not have actual knowledge of the shallowness of the water, plaintiff had constructive knowledge of the danger at the dock where his injury occurred, and he ignored obvious and unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety under the circumstances. Even though defendant may be comparatively more negligent than plaintiff in this matter, the record contains competent evidence that plaintiff was negligent, and his negligence was a proximate cause of his injuries. Accordingly, the Full Commission concludes that plaintiff's contributory negligence serves as a bar to his recovery of any damages from defendant.

The Commission relied on its findings discussed *supra*, which were not founded upon competent evidence. Contributory negligence "is a mixed question of law and fact, and this Court must determine whether

the Commission's findings of fact support its conclusion that a plaintiff was or was not contributorily negligent." *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 221, 588 S.E.2d 42, 49 (2003) (citation and alterations omitted).

¶ 34 "[A party] cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279. A party can be contributorily negligent without knowledge of the danger of injury which his conduct involves, "if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith*, 300 N.C. at 673, 268 S.E.2d at 507. Here, Plaintiff had no actual or constructive knowledge of the "unknown" danger at the end of the pier. Plaintiff did not act unreasonably when he noted the opacity of the water, swim ladders, and lack of warning signs before entering the water. Due to the high botanic acid levels in Lake Waccamaw, the shallow water was not a danger "which would have been apparent" to a reasonable person. Therefore, we hold the Commission's findings of fact are unsupported by competent evidence, and its conclusions of law are unsupported by its findings of fact.

IV. Conclusion

¶ 35 We conclude that the Commission's findings of fact as to the defense of contributory negligence are not supported by competent evidence and its conclusion of law that Plaintiff was contributorily negligent is not supported by its findings. We reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges DIETZ and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 APRIL 2021)

ISAK v. WILLIAMS 2021-NCCOA-140 No. 20-205	Johnston (18CVD1144)	Reversed and Remanded
STATE v. McMILLIAN 2021-NCCOA-145 No. 20-251	Columbus (18CRS418-419)	Affirmed in part, Vacated in part and Remanded
ASBUN v. N.C. DEP'T OF HEALTH AND HUM. SERVS. 2021-NCCOA-152 No. 20-346	Office of Admin. Hearings (19OSP03469)	Dismissed
COUSIN v. COUSIN 2021-NCCOA-154 No. 19-1152	Mecklenburg (16CVD9730)	Vacated in part; remanded.
IN RE K.R. 2021-NCCOA-155 No. 20-507	Onslow (19JA102) (19JA103) (19JA104)	Vacated
IN RE S.M. 2021-NCCOA-156 No. 20-871	Mecklenburg (18JB473)	VACATED AND REMANDED.
NICHOLS v. N.C. ADMIN. OFF. OF THE COURTS 2021-NCCOA-157 No. 19-430	N.C. Industrial Commission (TA-26062)	Affirmed
STATE v. BROADWAY 2021-NCCOA-158 No. 20-318	Cabarrus (18CRS54344)	No Error
STATE v. BROOKS 2021-NCCOA-159 No. 20-420	Union (17CRS50228)	Affirmed
STATE v. BURNS 2021-NCCOA-160 No. 20-259	Union (17CRS51105-06)	No Error

STATE v. CARVER 2021-NCCOA-161 No. 19-555	Gaston (17CRS53205-06) (17CRS53210) (17CRS53291) (17CRS53298) (17CRS53399) (17CRS54016) (17CRS54018)	Dismissed
STATE v. COLTRANE 2021-NCCOA-162 No. 20-529	Alamance (12CRS54599) (12CRS54600) (12CRS7986)	NO PREJUDICIAL ERROR.
STATE v. GARCIA 2021-NCCOA-163 No. 20-380	Burke (15CRS50878)	No Error.
STATE v. HALL 2021-NCCOA-164 No. 20-331	Lincoln (16CRS51007) (16CRS642)	No Error.
STATE v. HELTON 2021-NCCOA-165 No. 20-252	Lincoln (17CRS51768)	Reversed
STATE v. HERNANDEZ 2021-NCCOA-166 No. 20-510	Onslow (18CRS53432)	No Error
STATE v. HEWITT 2021-NCCOA-167 No. 17-1157-2	Catawba (11CRS3822-23) (11CRS4077) (11CRS51398) (11CRS51400-401)	Reversed and Remanded.
STATE v. HOLLAND 2021-NCCOA-168 No. 20-493	Gates (15CRS50322)	Affirmed
STATE v. HUNEYCUTT 2021-NCCOA-169 No. 20-500	Cabarrus (17CRS55462)	Affirmed
STATE v. JAMES 2021-NCCOA-170 No. 20-73	Dare (13CRS51315) (13CRS973)	No Error.

STATE v. LOVETT 2021-NCCOA-171 No. 20-539	New Hanover (17CRS57941) (17CRS57942)	No Error
STATE v. McDOUGAL 2021-NCCOA-172 No. 20-474	Nash (18CRS52921)	No Error
STATE v. RICHMOND 2021-NCCOA-173 No. 20-615	Guilford (19CRS66322)	DISMISS WITHOUT PREJUDICE
TODD v. TODD 2021-NCCOA-174 No. 20-481	Iredell (20CVD468)	Affirmed
VONHALL v. VONHALL 2021-NCCOA-175 No. 20-466	Cabarrus (17CVD3512)	Affirmed.
WESTLAND GRP., INC. v. ASCENTIUM CAP., LLC 2021-NCCOA-176 No. 20-356	Henderson (18CVS655)	Affirmed

CULBRETH v. MANNING

[277 N.C. App. 221, 2021-NCCOA-177]

JOHN C. CULBRETH, JR., Individually and Derivatively on Behalf of SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, and SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Plaintiffs

v.

CHRIS MANNING, Defendant

JOHN C. CULBRETH, JR., Derivatively on Behalf of SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Plaintiff

v.

GREEN VALLEY SOUTH LLC and SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, Defendants

No. COA20-368

Filed 4 May 2021

1. Appeal and Error—standard of review—nature of order—Rule 53 referee—report's findings—whether supported by competent evidence

In a financial dispute between two owners of a limited liability company, in which an accountant was appointed as a referee, pursuant to Civil Procedure Rule 53, to prepare a summary of the company's accounts and was later directed to prepare a report under the terms of a settlement agreement, the accountant continued to act as a Rule 53 referee when preparing his final report, as evidenced by the trial court's orders and language used in the parties' communications. Therefore, the correct standard of review on appeal of the trial court's order (granting plaintiff's motion to enforce a settlement agreement and entering judgment against defendant in the amount of $170,349.00) was whether the referee's findings that were adopted by the trial court were supported by competent evidence, with any challenged conclusions of law being reviewed de novo.

2. Civil Procedure—Rule 53—appointed referee—report—trial court's findings—sufficiency of evidence

In a financial dispute between two owners of a limited liability company, in which a referee was appointed pursuant to Civil Procedure Rule 53, the trial court's order granting plaintiff's motion to enforce a settlement agreement and directing defendant to pay $170,349.00 to plaintiff was vacated, where there was no competent evidence to support the court's decision. The amount determined did not reflect the terms of the parties' settlement agreement, which required the company's capital accounts to be balanced, nor was it consistent with the findings of the referee's report.

Appeal by Defendant Manning from Order entered 17 December 2019, by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 10 February 2021.

Brooks, Pierce, McClendon, Humphrey & Leonard, L.L.P, by Charles E. Coble and Walter L. Tippett, Jr., for plaintiff-appellee.

Hutchens Law Firm, by Natasha M. Barone, H. Terry Hutchens, J. Scott Flowers, and J. Haydon Ellis, for defendant-appellant Chris Manning.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Chris Manning (Defendant) appeals from the trial court's Order dated 17 December 2019, which granted John C. Culbreth, Jr., (Plaintiff), individually and derivatively on behalf of Southeast Development of Cumberland, LLC's (Southeast) Motion to Enforce Settlement Agreement, which included entering judgment against Defendant in the amount of $170,349.00. The Record reflects the following relevant facts:

¶ 2 Beginning in 2003, Plaintiff and Defendant formed Southeast, a member-managed, limited liability company organized in the State of North Carolina, of which they each owned a fifty-percent interest. In 2010, Plaintiff and Defendant began to dispute the management of Southeast.

¶ 3 Plaintiff filed a complaint alleging Defendant mismanaged finances and record keeping (the 2010 Action), and ultimately, on 14 February 2011, the Cumberland County Superior Court entered an Order (2011 Referee Order) appointing Lawrence W. Blake, CPA, as a referee under N.C. R. Civ. P. 53 to "collect, review and examine the financial, banking, corporate and other records of [Southeast]" to determine the members capital accounts, identify Southeast's assets and liabilities, and prepare a balance sheet and statement of profit and loss. The 2011 Referee Order directed Blake to file this report with the trial court on or before 6 June 2011, and provided: "This Court retains jurisdiction of this matter to enter further Orders necessary or required by the Referee or the parties to enforce the terms of this Order." Accordingly, Blake filed reports on 3 June 2011, 16 August 2011, and again on 12 June 2012.

¶ 4 However, five years later, on 23 August 2017, Plaintiff derivatively on behalf of Southeast, instituted a second action against Defendant and

Green Valley South LLC (Green Valley), a limited liability company of which Defendant owned a fifty-percent interest (the 2017 Action).

¶ 5 On 10 December 2018, the parties entered into a Settlement Agreement, agreeing "to resolve and to settle all controversies between them, including any claims each may have asserted or could have asserted in the Subject Actions[.]"[1] The Settlement Agreement provided in paragraph 2(e):

> Plaintiff and Defendant will reconcile their respective capital accounts in Southeast, pursuant to a report ("the Blake Report") to be prepared by L. W. Blake, CPA ("Blake"), who was previously appointed by the Court to serve as a referee in the 2010 Action. The Blake Report will be completed by February 29, 2019, and shall direct that either Plaintiff or Defendant shall make such payment within 30 days as is necessary to balance their Southeast capital accounts. The Blake Report shall be prepared consistent with the following terms:
>
> > (i) Defendant shall deposit $25,000.00 (the "Blake Deposit") with Blake to pay his fees and expenses in completing the Blake Report. Defendant shall receive a credit toward his Southeast capital account equal to the amount of the Blake Deposit actually expended and to a refund of the remainder.
> >
> > (ii) Plaintiff, Defendant, and their respective accounting and legal advisors shall be entitled to communicate with Blake in regard to his preparation of the Blake Report so long as any written communications are contemporaneously provide[d] to counsel for the other party. Blake shall be similarly entitled to seek information from the parties and their advisors.
> >
> > (iii) Defendant shall be entitled to a credit toward his Southeast capital account equal to the Settlement Payment. Blake shall determine

1. The Settlement Agreement defined, "the 2010 Action and the 2017 Action may be referenced herein as 'the Subject Actions[.]' " (emphasis in original).

> whether the Settlement Payment, or any portion thereof, should be deducted from Plaintiff's capital account.
>
> (iv) The Blake Report shall be binding and not subject to appeal. It may be converted to a judgment in the 2010 Action upon the motion of either Plaintiff or Defendant if the party directed to make the required payment. If the party directed to make a payment completes his obligation to do so, then the 2010 Action shall be promptly dismissed by Plaintiff or by order of the Court, together with cancellations of all Notices of *Lis Pendens* and similar documents clouding title to real property that any Party has filed in regard to the 2010 Action.

(emphasis in original). In releasing the parties from all claims, the Settlement Agreement maintained "this release shall not be construed to release any claim arising in favor of or against any Party due to an alleged breach of this Agreement or failure to comply with the Blake Report."

¶ 6 The next day, on 11 December 2018, the parties filed a Joint Motion for Approval of Discontinuance of Derivative Proceedings. The parties' Joint Motion explained "the claims in File No. 10 CVS 2964 will be administered with the assistance of L.W. Blake, CPA, who was previously appointed by this Court as a referee in that matter;" and provided the claims in the 2010 Action would be dismissed with prejudice "upon the completion of Mr. Blake's Report and the parties adherence thereto[.]" On 17 December 2018, the trial court entered an Order Approving Discontinuance of Derivative Proceedings (Approval Order), consistent with the parties' Joint Motion, which provided:

> The derivative claims in File No. 10 CVS 2964 shall be administered and adjudicated *as set forth in Settlement Agreement*. This Court shall retain jurisdiction for entry of a judgment or such other orders as may be necessary to enforce or complete the settlement, if necessary. Otherwise, Plaintiffs' counsel is authorized to file a dismissal of the derivative claims without further order of the Court[.]

(Emphasis added).

¶ 7 Then, on 18 October 2019, Plaintiff filed a Motion to Show Cause and for relief from the Approval Order on the basis that Blake failed to complete the Report by the 29 February 2019, date agreed upon in the Settlement Agreement. Plaintiff further alleged that on 21 June 2019, "Blake committed to complete his report by August 1, 2019." Yet, "Blake failed to complete his report by August 1, 2019[,] and, further, Blake "failed to communicate in any manner whatsoever since June 21, 2019" and did not respond to communications from counsel dated 19 September and 4 October 2019. On 22 October 2019, the trial court entered an Order for Completion of Capital Account Report (Completion Order), which ordered:

> (1) On or before 5:00 P.M. on Tuesday, November 12, 2019, the Referee shall serve the report contemplated by paragraph 2(e) of the parties' Settlement Agreement to each of the parties' counsel of record; and
>
> (2) The hearing on the Motion is continued . . . unless such matters have been rendered moot by the Referee's service of the report, as required above.

On 12 November 2019, Blake transmitted his Report (the Blake Report) to the trial court. The Blake Report provided, "As of December 31, 2018 the capital account of Chris Manning was a deficit of $501,965, the capital account of John C. Culbreth was a deficit of $331,616. I have attached Exhibit A to this letter." The Blake Report continued to identify: related parties, open assets or unpaid liabilities that Blake did *not* consider to be "related party entities," those open assets and unpaid liabilities that Blake *did* consider to be related party entities, partnership investments, settlement payments, cashless transfers of real estate, and a 2011 Curtailment Agreement with First Bank.

¶ 8 Blake also attached Exhibit B:

> The purpose of Exhibit B is to provide the Court with a summary that may be useful in quantifying the facts and circumstances provided in previous paragraphs. As a starting point, Exhibit B uses the December 31, 2018 capital accounts as shown on Exhibit A. Calculation of the partner's capital accounts is my prime directive as described in paragraph 2(e) of your December 17, 2018 order. Presented in Exhibit B

> are three *additional financial groupings that are not strictly capital contributions or distributions*.

(emphasis added).

¶ 9 On 5 December 2019, Plaintiff, individually and derivatively on behalf of Southeast, filed a Motion to Enforce Settlement Agreement. In his Motion, Plaintiff requested the trial court enter a judgment directing Defendant pay Plaintiff $170,349.00—the difference in the deficits of Plaintiff and Defendant's respective capital accounts. The trial court heard Plaintiff's Motion on 16 December 2019. That morning, around fifteen minutes before the hearing began, Blake filed an Amendment to the Blake Report (the Amendment), "intended to be responsive to paragraph 3(e) [sic]" of the Approval Order.[2] The Amendment revised Exhibit B and stated "[b]ased on my calculations, the Plaintiff (Culbreth) is liable to the Defendant (Manning) in the amount of $261,530."

¶ 10 The next day, on 17 December 2019, "[a]fter considering all competent matters of record, including the verified Motion [to Enforce], with exhibits, and other proper evidence submitted in support and in opposition to the Motion, together with the applicable law and the arguments of counsel," the trial court entered its Order granting Plaintiff's Motion to Enforce the Settlement Agreement and entering Judgment against Defendant in the amount of $170,349.00 in 10 CVS 2964. Defendant timely appealed from the trial court's Order on 15 January 2020.

Issues

¶ 11 The dispositive issues on appeal are whether (I) the trial court's Order is an order to enforce a settlement agreement or is an adoption of a referee's report under N.C. R. Civ. P. Rule 53 for purposes of applying the correct standard of review; and (II) in turn, applying the proper standard of review, the trial court erred in entering the Order granting Plaintiff's Motion to Enforce the Settlement Agreement and in entering Judgment against Defendant.

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2. The Record reflects that at 5:26 p.m. on 15 December 2019, counsel for Defendant sent Blake an email with the subject line "Referee's report," to "follow[ ] up on [an] earlier conversation." In the email, counsel requested "[Blake] consider filing an amendment to [the Blake] report as I have argued … is required under the Settlement Agreement and [the trial court's] order and in that amendment set out the amount which either or both part[ies] must pay to balance their respective capital accounts at Southeast."

Analysis

I. Standard of Review

¶ 12 **[1]** The status of the Blake Report as a Rule 53 referee report is relevant for the determination of the appropriate standard of review to apply to the trial court's Order. The parties dispute whether Blake was serving in his capacity as a referee under N.C. R. Civ. P. Rule 53 after the Settlement Agreement and Approval Order appointed him to create the Blake Report. Plaintiff contends, although not expressly appointed under Rule 53, Blake was acting his capacity as a Rule 53 referee because the Settlement Agreement and Approval Order directed him to review Southeast's records and to subsequently create and file the Blake Report with the trial court. Thus, when the trial court entered its Order to enforce the Settlement Agreement and entered Judgment against Defendant, it was adopting the Blake Report as a referee report. *See* N.C. Gen. Stat. § 1A-1, Rule 53(g) (2019). Defendant argues the Order should be treated as captioned—as an order to enforce a settlement agreement.

¶ 13 "[O]ur standards of review are dictated by the substance of the motion under consideration and the type of hearing conducted . . . ." *Sfreddo v. Hicks*, 266 N.C. App. 84, 88, 831 S.E.2d 353, 356 (2019) (citation omitted). "Appellate review of factual findings made by a referee and adopted by the trial court is limited to whether the challenged findings were supported by any competent evidence. Challenged legal conclusions are reviewed *de novo*." *Bullock v. Tucker*, 262 N.C. App. 511, 518-19, 822 S.E.2d 654, 659 (2018) (citations and quotation marks omitted). Meanwhile, "[a] motion to enforce a settlement agreement is treated as a motion for summary judgment for purposes of appellate review[,]" *Williams v. Habul*, 219 N.C. App. 281, 288, 724 S.E.2d 104, 109 (2012) (citation and quotation marks omitted), and "[o]ur standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 14 Under Rule 53 of the North Carolina Rules of Civil Procedure,

> the court may, upon the application of any party or on its own motion, order a reference in the following cases:
>
> > a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

> b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

N.C. Gen. Stat. § 1A-1, Rule 53(a)(2) (2019).

¶ 15 Furthermore, "[t]he referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted." *Id.* § 1A-1, Rule 53(g)(1). Once filed,

> All or any part of the report may be excepted to by any party within 30 days . . . . Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions.

Id. § 1A-1, Rule 53(g)(2).

¶ 16 The parties do not dispute Blake was originally appointed by the trial court in the 2011 Referee Order to serve as a Rule 53 referee, and further that Blake filed a series of three reports complying with the 2011 Referee Order. However, the 2011 Referee Order is the only order expressly appointing Blake as a referee. The current dispute is whether the Blake Report, created in accordance with the Settlement Agreement, was also done so as a Rule 53 referee's report.

¶ 17 Here, the Settlement Agreement and the trial court's Approval Order directed Blake to review the records of Southeast and to file a report including a balance sheet and statement of Southeast's profits and losses, as was consistent with Blake's role under the 2011 Referee Order. Such direction is also consistent with the function of Rule 53, which provides for a reference "[w]here the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect." N.C. Gen. Stat. § 1A-1, Rule 53(a)(2)(b).

¶ 18 Furthermore, the trial court's Order for Completion of Capital Account Report, entered in 2019 upon a motion filed by Plaintiff after Blake failed to meet the deadline in the Settlement Agreement, stated "*the Referee* shall serve the report contemplated by paragraph 2(e) of the parties' Settlement Agreement to each of the parties' counsel of record . . . ." (emphasis added). Even further, in email communication dated the day before the 16 December 2019 hearing, Defendant's

counsel communicated with Blake about the status and contents of the "Referee's report."

¶ 19 Thus, although Blake satisfied his initial role as contemplated in the 2011 Referee Order when he filed the three reports, the 2010 Action was not finally resolved until the trial court's December 2019 Order, from which this appeal was taken.[3] Accordingly, it is apparent from the trial court's subsequent orders and the parties communications, Blake continued to serve as a Rule 53 referee until the entry of the trial court's Order in 2019. The Blake Report, as contemplated in the parties' Settlement Agreement and the trial court's Approval Order, is a referee report. Plaintiff's Motion to Enforce sought to enforce the findings of the Blake Report as incorporated by the Settlement Agreement "through entry of a judgment directing that Defendant [Manning] pay Culbreth $170,349.00." Thus, we review "factual findings made by a referee and adopted by the trial court" for "whether the challenged findings were supported by any competent evidence[,]" and conclusions of law made in accordance de novo. *Bullock*, 262 N.C. App. at 518-19, 822 S.E.2d at 659 (citation and quotation marks omitted).

II. Settlement Agreement

¶ 20 **[2]** Ultimately, Defendant "appeals the Court's interpretation of the Blake Report and the trial court's failure to require that all provisions of the Settlement Agreement were complied with prior to entering a judgment." Because we determined the Blake Report was indeed a Rule 53 referee report, "[a]ppellate review of factual findings made by a referee and adopted by the trial court is limited to whether the challenged findings were supported by any competent evidence." *Bullock*, 262 N.C. App. at 518, 822 S.E.2d at 659 (citation and quotation marks omitted). Any conclusions of law made in accordance are reviewed de novo. *Id.* at 519, 822 S.E.2d at 659.

¶ 21 Paragraph 2(e) of the Settlement Agreement directed "The Blake Report . . . shall direct that either Plaintiff or Defendant shall make such payment . . . as is necessary to *balance* their Southeast capital accounts." (emphasis added). The Blake Report, as submitted on 12 November 2019, reported: "Paragraph 2(e) directs me to determine the capital account of each member of [Southeast]. As of December 31, 2018 the capital account of [Defendant] Manning was a deficit of $501,965, the capital account of [Plaintiff] Culbreth was a deficit of $331,616. I

3. The $170,349.00 Judgment entered against Defendant was intended to finally resolve 10 CVS 2964 and is now part of Defendant's appeal.

have attached Exhibit A to this letter." Exhibit A, attached to the Blake Report, reiterated the respective deficits and reports a combined total deficit of $833,581.00. The Blake Report also attached Exhibit B, which it clarified: "The purpose of Exhibit B is to provide the Court with a summary that may be useful in quantifying the facts and circumstances provided in previous paragraphs. . . . Presented in Exhibit B are three *additional financial groupings that are not strictly capital contributions or distributions*." (emphasis added).

¶ 22 Defendant contends the Blake Report—prior to the addition of the Amendment—was not responsive to paragraph 2(e) because it did not expressly direct either party to "make such payment . . . necessary to *balance* their Southeast capital accounts[,]" and therefore paragraph 2(e) was only satisfied when Blake filed his Amendment directing Plaintiff to pay Defendant $261,530.00 on 16 December 2019. Defendant further contends no competent evidence supports the trial court's decision to disregard Exhibit B.

¶ 23 Per the Blake Report, the respective capital accounts were as shown on Exhibit A: Defendant's deficit of $501,965.00 and Plaintiff's deficit of $331,616.00, combined for a total deficit of $833,581.00. Defendant's argument asserting no competent evidence supports the trial court's decision to disregard Exhibit B is refuted by the language of Exhibit B—namely, the "three additional financial groupings" presented therein, "are not strictly capital contributions or distributions."

¶ 24 However, the trial court's subtraction of Plaintiff's $331,616.00 deficit from Defendant's $501,965.00 deficit, and the entry of judgment in the amount of the $170,349.00 difference, do not balance the two capital accounts. Therefore, reviewing this finding for support from competent evidence, we conclude the entry of default judgment against Defendant in the amount of $170,349.00 is not supported by competent evidence in the Record, including the Blake Report.

¶ 25 Instead, as Defendant correctly notes on appeal, to balance the parties' respective capital accounts, the finally balanced accounts would need to have equal deficits. To determine the amount required to balance the accounts, Plaintiff's $331,616.00 deficit and Defendant's $501,965.00 deficit would be added together, resulting in a combined deficit of $833,581.00, as shown in Exhibit A. The $833,581.00 deficit would then be divided by the two capital accounts, showing the capital accounts would be balanced with equal deficits of $416,790.50. Therefore, to ultimately balance the two Southeast capital accounts, Defendant would

need to pay Plaintiff $85,174.50, which would render the respective capital accounts with equal deficits of $416,790.50.[4]

¶ 26 Accordingly, the trial court's entry of Judgment against Defendant in the amount of $170,349.00 is not consistent with the Settlement Agreement's direction for the capital accounts to be balanced or with the Blake Report's findings. On remand, the trial court may consider all competent evidence before it. Consistent with Rule 53(g), the trial court "may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C. Gen. Stat. § 1A-1, Rule 53(g)(2).

Conclusion

¶ 27 Accordingly, for the foregoing reasons, the trial court's Order to Enforce the Settlement Agreement and entering Judgment against Defendant is vacated. The matter is remanded to the trial court for further findings and proceedings in accordance with N.C. R. Civ. P. 53.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

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4. Put another way and in the context of dissolving and winding-up the LLC, under this calculation, Defendant really owes *Southeast* $170,349.00 for distributions received in excess of his membership interest. In winding up the LLC, once Southeast "collects" the $170,349.00, *see* N.C. Gen. Stat. § 57D-6-07(d) (2019), Southeast's assets would be marshalled and applied by distributing "[t]he balance to the interest owners as distributions in the manner provided in G.S. 57D-4-03." *Id.* § 57D-6-08. N.C. Gen. Stat. § 57D-4-03 provides in relevant part: "Distributions to interest owners . . . after the dissolution of the LLC, may be made . . . in such amounts as determined by the LLC in proportion to the ratios that the aggregate combined contribution amounts of the interest owners bear to one another . . . ." *Id.* § 57D-4-03. Here, this would result in the $170,349.00 being distributed to each member according to their 50% interest, or $85,174.50 apiece.

STATE OF NORTH CAROLINA
v.
MARVIN ELSWORTH CRUDUP

No. COA20-20

Filed 4 May 2021

1. Indictment and Information—section 15A-630—untimely notice of indictment—no prejudice

In a prosecution for charges arising from a home break-in, where defendant did not receive the original indictments in the mail and was not served with a superseding indictment until the first day of trial, the trial court's failure to timely "cause notice of the indictment" to be provided to defendant—pursuant to N.C.G.S. § 15A-630—did not amount to reversible error. Section 15A-630 is not jurisdictional, and the error did not prejudice defendant where he had previously signed two waiver of counsel forms acknowledging that he knew the charges against him, stated he was ready to proceed to trial despite receiving late notice of the superseding indictment, was asked (pursuant to N.C.G.S. § 15A-1242) by the trial court whether he understood the charges against him, and had ample opportunity to prepare his defense after viewing surveillance footage of the break-in.

2. Criminal Law—pro se defendant—request for appointed standby counsel—N.C.G.S. § 15A-1243—no abuse of discretion or prejudicial error

The trial court did not abuse its discretion under N.C.G.S. § 15A-1243 when it denied defendant's request for standby counsel, where defendant made the request on the second day of trial, after the jury had been empaneled, and after he had previously waived appointed counsel twice and told the court he was ready to proceed to trial. Defendant's trial was also free from prejudicial error where, after the court declined to appoint standby counsel, defendant's conduct in changing into his jail-issued orange jumpsuit and refusing to return to the courtroom for the duration of the trial appeared to be for the purpose of delaying trial.

Appeal by defendant from judgment entered 20 December 2018 by Judge Alma Hinton in Vance County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. Gibbs, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

TYSON, Judge.

¶ 1 Marvin Elsworth Crudup ("Defendant") appeals from a judgment entered after a jury found him guilty of felonious breaking and entering, felonious larceny after breaking and entering, and attaining the status of habitual felon. We find no error.

I. Background

¶ 2 Steven Matthews ("Matthews") received a security notification detecting motion in his living room on 24 April 2018 while he was at work. The camera's surveillance footage showed a man rummaging through his refrigerator and cabinets, and moving throughout the home. After notifying his supervisor about the intruder, Matthews left work and called 911. Vance County Sheriff's deputies were already on scene when he arrived home. The only item missing was a coffee canister, which Matthews estimated contained approximately $100.

¶ 3 Two days after the break-in, Matthews showed his landlord, Mike Dickerson ("Mr. Dickerson"), the security camera recording of the perpetrator. Mr. Dickerson immediately identified Defendant due to previous incidents. Matthews relayed Defendant's name to Detective Robert Morris ("Detective Morris").

¶ 4 Detective Morris went to Defendant's residence, which is located on the same road as Matthews' home, on 26 April 2018. As Detective Morris approached Defendant's residence, he noticed a bicycle containing an abnormal screwdriver. Detective Morris testified "in the world of investigations," that item was considered to be a burglary tool used to pry open objects. After being unable to get anyone to answer the door, Detective Morris left the residence and returned later. Upon his return, he observed Defendant walking toward the back yard. Detective Morris requested Defendant to come to the Sheriff's station.

¶ 5 At the station, Defendant viewed the security video of the break-in, but insisted the person depicted was not him. Based upon previous interactions, Sergeant Donnie Thomas was able to identify Defendant as the man shown on the surveillance video. Defendant was subsequently arrested for breaking and entering and breaking and entering with the intent to commit larceny.

¶ 6 Defendant waived his right to appointed counsel on 30 April and again on 18 July of 2018. On 11 June 2018, a grand jury returned a two-count true bill of indictment charging Defendant with breaking and entering, breaking and entering with the intent to commit larceny, and attaining status as a habitual felon. The indictments were mailed to Defendant's residence, but he never received them.

¶ 7 On 26 September 2018, Defendant filed a *pro se* motion to dismiss alleging he had not been served any indictments. The trial court denied Defendant's motion, but ordered Defendant to be served with a formal copy of his indictment. Defendant also signed an Acknowledgment of Rejection and Withdrawal of Plea that day.

¶ 8 Defendant's trial began on 17 December 2018. That same day, a grand jury issued a superseding indictment alleging Defendant had attained the status of habitual felon. Despite the trial court's previous order, the trial judge discovered Defendant had not received a copy of his two-count true bill of indictment. The trial judge ordered Defendant to be escorted from the courtroom and served with the indictment. After receiving the indictment, Defendant stated he was ready to proceed to trial.

¶ 9 After the jury was empaneled on the second day of trial, Defendant requested standby counsel be appointed. The trial judge, seeing only prosecutors present in the courtroom, denied Defendant's request. Defendant changed into his jail-issued orange jumpsuit and refused to return to the courtroom. For the duration of his trial, Defendant refused to return to the courtroom and participate.

¶ 10 After being unable to gain Defendant's cooperation and return to the courtroom, the trial judge proceeded through trial and allowed the State to present its case. The jury returned a verdict of guilty for felony breaking and entering, felony larceny after breaking and entering, and for Defendant attaining status as a habitual felon on 18 December 2018. The trial court sentenced Defendant as a prior record level VI offender to an active term of a minimum of 128 months to 166 months. Defendant gave notice of appeal in open court.

II. Jurisdiction

¶ 11 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

¶ 12 Defendant argues the trial court erred by failing to timely "cause notice of the indictment" be provided to him pursuant to N.C. Gen. Stat.

§ 15A-630 (2019), and by denying his motion for standby counsel with the jury empaneled and trial underway.

IV. N.C. Gen. Stat. § 15A-630

A. Standard of Review

¶ 13 Errors of statutory construction are questions of law which this Court reviews *de novo*. *State v. Patterson*, 266 N.C. App. 567, 570, 831 S.E.2d 619, 622 (2019). Upon *de novo* review, we consider the matter anew and are free to substitute this Court's judgment for that of the trial court. *Id.*

B. Analysis

¶ 14 **[1]** In his first argument of error, Defendant contends the trial court's failure to follow the timely notice requirement of N.C. Gen. Stat. § 15A-630 "undermined his ability to prepare for trial and to knowingly assert or waive his statutory rights to counsel, discovery and arraignment." We disagree.

¶ 15 N.C. Gen. Stat. § 15A-630 provides that:

> Upon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant unless he is then represented by counsel of record. The notice must inform the defendant of the time limitations upon his right to discovery under Article 48 of this Chapter, Discovery in the Superior Court, and a copy of the indictment must be attached to the notice.

N.C. Gen. Stat. § 15A-630. "[T]he Official Commentary of N.C. Gen. Stat. § 15A-630" establishes that the statute is not jurisdictional and was enacted to set the "starting point" of the discovery period. *State v. Williams*, 77 N.C. App. 136, 139, 334 S.E.2d 491, 493 (1985).

¶ 16 "The purpose of an indictment" is to provide defendant with: (1) "notice of the charges against him so he may prepare an adequate defense; and (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Wilson*, 108 N.C. App. 575, 584, 424 S.E.2d 454, 459 (1993).

¶ 17 Defendant signed a Waiver of Counsel form on 30 April 2018 acknowledging, "I have been fully informed of the charges against me[.]" The trial court also certified on the Waiver of Counsel that it had fully

informed Defendant "of the charges against him[.]" At the hearing on 18 July 2018, the trial court likewise informed Defendant, "you're charged with felonious breaking and entering, felonious larceny after breaking and entering, and having obtained the status of being an habitual felon." On that date, Defendant signed a second Waiver of Counsel. After signing the Waiver of Counsel, the trial court informed Defendant that "the State is free to talk to you now about whatever you want to" and that the State would give him a copy of discovery that day.

¶ 18 On the morning of the first day of trial, the prosecutor told the trial court that "back on July 18th of this year, I provided discovery in court -- the DA's Office provided that to [Defendant], July 18th." The prosecutor specified that "it was a copy of my complete file, so that included the indictment as well[,]" and a copy of the surveillance video in its entirety, but Defendant asserted he had not received the indictments. Also, that morning, a grand jury returned a superseding indictment charging Defendant with attaining the status of habitual felon. Initially, the trial judge had no intention of serving the indictment and trying the case in the same session. Defendant stated he was ready to proceed to trial, despite being served with the superseding indictment shortly before. The following colloquy took place:

> THE COURT: All right. And the State is intending to proceed on habitual felon, breaking and/or entering, and larceny after breaking and entering?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: And is seeking to enhance the breaking and entering and larceny with the habitual felon; is that correct?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: And you are proceeding *pro se*, is that correct, [Defendant]?
>
> [DEFENDANT]: Yes, ma'am.

¶ 19 Following this exchange, the trial judge questioned Defendant to ensure that the Defendant was capable of proceeding *pro se*. When the trial court is satisfied the defendant is: (1) clearly advised of his right to counsel, (2) understands the consequences of the decision; and (3) comprehends the charges and range of potential punishments, a defendant's decision to represent himself must be respected and upheld, pursuant

to N.C. Gen. Stat. § 15A-1242 (2019). *State v. Sorrow*, 213 N.C. App. 571, 573-74, 713 S.E.2d 180, 182 (2011). At both the July 2018 hearing and on the first day of trial, the trial court properly performed the foregoing inquiry. Defendant signed and acknowledged his wavier to counsel in open court and decided to represent himself.

¶ 20 Although Defendant was not timely served with the indictment, such delay was not jurisdictional, and he has not shown he was prejudicially harmed by the delay. Defendant was under arrest, in jail, and completely aware of the charges against him. Defendant was given a copy of the discovery at the July hearing. Defendant filed a motion to dismiss due to the "nonexistence of a True Bill of Indictment," which the trial court dismissed.

¶ 21 Defendant was permitted to view home surveillance footage prior to arrest and trial. At the motion to dismiss hearing, Defendant stated: "I viewed the video. The individual on the video was not me." These actions indicate Defendant acknowledged the charges, and he viewed and disagreed with the evidence the State had against him. Defendant was provided ample opportunity to prepare an adequate defense and denied he was the person shown in the recording. His arguments are overruled.

V. Motion for Standby Counsel

A. Standard of Review

¶ 22 The trial court's decision to appoint standby counsel rests within its sound discretion. N.C. Gen. Stat. § 15A-1243 (2019). We will not disturb a trial court's discretionary ruling "unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000) (alterations, citations and quotation marks omitted).

B. Analysis

¶ 23 **[2]** N.C. Gen. Stat. § 15A-1243 provides:

> When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may appoint standby counsel to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion.

N.C. Gen. Stat. § 15A-1243 (2019).

¶ 24 Appointment of standby counsel is a statutory creation, where otherwise expected counsel's duties are limited by statute, and a defendant "does not benefit from a typical lawyer-client relationship." *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 478 (1992).

¶ 25 Defendant requested standby counsel for the first time on the second day of trial, after the jury had been empaneled, and while his trial was well underway. Defendant's request occurred after he previously and knowingly waived appointment of counsel twice, stated he was prepared to proceed to trial and participated in the process of jury selection. After hearing Defendant's request, the trial judge stated, "[w]e have now successfully selected a jury with an alternate, empaneled that jury, and are ready for opening statements . . . seeing no attorneys in the courtroom, other than prosecutors, that request is denied." Following a brief recess, Defendant changed into his orange jail jumpsuit and refused to participate in his trial unless given standby counsel. After repeatedly trying to bring Defendant back to the courtroom, the trial court proceeded with opening statements with Defendant *in absentia*.

¶ 26 This Court held no error occurred in a trial court's refusal to grant the defendant's request for standby counsel when the defendant proved indecisive in *State v. Brooks*:

> Defendant waived his right to appointed counsel and the record makes it clear that the waiver was knowingly and intelligently made, and that it was granted only after defendant had been informed of the nature of the charges against him and of his right to appointed counsel. Defendant's decision may not have been wise, but it is clear that he had every right to represent himself.
>
> . . . .
>
> The trial court, although not required to make any special effort to accommodate a defendant proceeding *pro se*, showed unlimited patience with the defendant throughout the trial. On one occasion defendant requested standby counsel, and the judge agreed to grant the request, but defendant changed his mind and elected not to use standby counsel. When, a few pages further into the record the defendant again requested standby counsel, it is not surprising that the judge refused. If defendant was not confident of his ability to represent himself, he was entitled

> to counsel appointed for his defense; but he had no right to standby counsel. The appointment of standby counsel is in the sound discretion of the trial court.

State v. Brooks, 49 N.C. App. 14, 18, 270 S.E.2d 592, 595–96 (1980) (alterations, citations, and internal quotation marks omitted).

¶ 27 Here, Defendant persisted in his desire to proceed without the assistance of appointed or retained counsel. Even if the trial court had granted Defendant's standby request, Defendant was still the primary party responsible for presenting his case. Defendant's decision to refuse to continue to participate in his trial appears to be a delaying tactic and is not prejudicial error.

¶ 28 The trial court, within its sound discretion, properly denied Defendant's request, because Defendant was given the opportunity to raise, settle, and waive any questions the day before.

¶ 29 Defendant's bald assertion that he is entitled to a new trial "because the right to counsel is a constitutional right" is both grossly misstated and misplaced. Defendant mischaracterizes the withdrawal of a waiver of counsel with the statutory standard set forth in N.C. Gen. Stat. § 15A-1243. Defendant has failed to show the trial court abused its discretion by denying Defendant's request. Defendant's argument is overruled.

VI. Conclusion

¶ 30 The trial court did not commit reversible error by failing to follow the statutory mandate set forth in N.C. Gen. Stat. § 15A-630. Defendant's motion for standby counsel was asserted after multiple waivers of counsel, the jury was empaneled, and after trial commenced. The denial of Defendant's motion rested within the discretion of the trial court. Defendant received a fair trial, free from prejudicial errors. We find no error in the jury's verdicts or in the trial court's judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges COLLINS and CARPENTER concur.

STATE v. DAW

[277 N.C. App. 240, 2021-NCCOA-180]

STATE OF NORTH CAROLINA
v.
PHILIP BRANDON DAW, DEFENDANT

No. COA20-680

Filed 4 May 2021

1. Appeal and Error—mootness—public interest exception—habeas corpus petition—continued imprisonment during global pandemic

The public interest exception to the mootness doctrine applied to an appeal from the summary denial of a petition for habeas corpus in which petitioner, who suffered from a respiratory illness, alleged that his continued imprisonment during the global coronavirus pandemic violated both federal and state constitutional guarantees against cruel and unusual punishment. Although petitioner had already been released from prison, a high number of similar petitions had been held in abeyance pending a resolution of petitioner's case, and therefore petitioner's appeal clearly affected "members of the public beyond just the parties in the immediate case."

2. Habeas Corpus—summary denial of petition—failure to make threshold showing—act, omission, or event entitling petitioner to discharge—continued imprisonment during global pandemic

The trial court's summary denial of a petition for habeas corpus, pursuant to N.C.G.S. § 17-4(2), was affirmed where petitioner, who suffered from a respiratory illness, alleged that his continued imprisonment during the global coronavirus pandemic violated both federal and state constitutional guarantees against cruel and unusual punishment. The petition failed to forecast admissible evidence demonstrating how petitioner's specific circumstances and medical condition put him at an elevated risk for serious illness or death from coronavirus (as compared to any other prisoner with coronavirus comorbidities), and therefore petitioner failed to show that a material issue of fact existed as to whether an "act, omission, or event" had occurred entitling him to discharge under N.C.G.S. § 17-33.

Appeal by Defendant from an order entered on 15 June 2020 by Judge Craig Croom in Wake County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Tin Fulton Walker & Owen, PLLC, by Jim Melo, and Goodman, Carr, Laughrun, Levine & Green, by W. Rob Heroy, for the Petitioner.

Erwin Byrd for Amicus Curiae North Carolina Advocates for Justice.

JACKSON, Judge.

¶ 1 Under review is the trial court's summary denial of a petition for habeas corpus. Phillip Brandon Daw ("Petitioner") alleges in his petition for habeas corpus that under N.C. Gen. Stat. § 17-33(2), because of an "act, omission or event, which has taken place after[] [his imprisonment], [] [he] has become entitled to be discharged." N.C. Gen. Stat. § 17-33(2) (2019). While there is no appeal of right from the denial of a petition for habeas corpus, *Chavez v. McFadden*, 374 N.C. 458, 470, 843 S.E.2d 139, 148 (2020), we granted a petition for certiorari filed by Petitioner to review the trial court's order. After careful review, we affirm the order of the trial court.

I. Background

¶ 2 On 1 May 2019, a Lenoir County grand jury indicted Petitioner with three felony counts of obtaining property by false pretenses. Petitioner pleaded not guilty to these charges. A jury convicted him of all three counts on 24 September 2019 in Lenoir County Superior Court. The trial court sentenced Petitioner to seven to 18 months in prison for each count and ordered that the sentences run consecutively.

¶ 3 Petitioner was then indicted again on two felony counts of obtaining property by false pretenses on 22 October 2018. On 26 November 2018, he was indicted on another felony count of obtaining property by false pretenses. On 10 December 2018, he was indicted on yet another felony count of obtaining property by false pretenses. He pleaded guilty to these new charges and was sentenced to six to 17 months in prison for the three counts from the October and December indictments, with the sentence to run concurrently with his sentence for the three charges of which he was convicted by the Lenoir County jury. Petitioner was sentenced to another concurrent sentence of eight to 19 months for the count from the November indictment.

¶ 4 In March of 2020, the World Health Organization declared that the spread of the novel coronavirus known as COVID-19 had reached pandemic proportions.[1] In what would be the first of many executive orders related to COVID-19, our Governor declared a state of emergency, taking numerous steps to coordinate a governmental response and limit the spread of the virus. *See* Exec. Order No. 116 (2020). As the first recital of that executive order states, "COVID-19 is a respiratory disease that can result in serious illness or death by the SARS-CoV-2 virus, . . . a new strain of coronavirus[.]" *Id.*

¶ 5 Petitioner was serving his sentence in prison at that time. In the earlier part of the month, he was serving his sentence at the Craven Correctional Institution, in Craven County, North Carolina. He was then transferred to Harnett Correctional Institution in Harnett County on 24 March 2020.

¶ 6 The North Carolina Department of Public Safety ("DPS") is the agency that administers prisons in our state. *See* N.C. Gen. Stat. § 148-4 (2019). The principal executive officer of that agency is the Secretary. *See id.* Under N.C. Gen. Stat. § 148-4, the Secretary of DPS is authorized to "extend the limits of the place of confinement of a prisoner, . . . [to] [p]articipate in community-based programs of rehabilitation, . . . and other programs determined by the Secretary . . . to be consistent with the prisoner's rehabilitation and return to society[.]" *Id.* On 13 April 2020, the Secretary of DPS announced that he was invoking this statutory authority to "extend the limits of confinement [] of incarcerated persons[,] allowing certain individuals to continue serving their sentence outside of a DPS prison facility, but under the supervision of community correction officers."

¶ 7 By the summer of 2020, the pandemic had worsened.[2] News of it had also become more widespread.[3] On 15 June 2020, Petitioner

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1. *See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, World Health Organization, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited March 18, 2021).

2. *Daily Updates of Totals by Week and State, COVID-19 Data from the National Center for Health Statistics*, Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm (last visited March 19, 2021).

3. *See, e.g., As New Coronavirus Cases Hit Another Record in the U.S., Some States Delay Reopenings*, The New York Times (June 25, 2020), https://www.nytimes.com/2020/06/25/world/coronavirus-updates.html (last visited March 19, 2020) ("The United States on Thursday reported more than 41,000 new coronavirus cases, a record total for the second straight day, as a nationwide sense of urgency grew and caseloads soared in Southern and Western states that were far removed from the worst early outbreaks.").

filed a petition for habeas corpus in Wake County Superior Court alleging that his continued imprisonment during the pandemic violated the guarantee against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and the guarantee against cruel or unusual punishment in Article 1, § 27 of the North Carolina Constitution. The trial court summarily denied the petition the same day.

¶ 8 Petitioner filed a petition for a writ of certiorari to review the trial court's summary denial of his petition for habeas corpus on 16 June 2020. It was granted by our Court on 9 July 2020. Petitioner then filed a motion for a peremptory setting of the case on 16 December 2020. That motion was also granted by our Court on 17 December 2020.

¶ 9 As noted above, oral argument in this case was heard on 9 February 2021. Six days later, Petitioner was released from prison.[4] He is now serving the remainder of his sentence outside of prison under the Extended Limits of Confinement Program instituted by DPS due to COVID-19.

II. Jurisdiction

¶ 10 Our Supreme Court has held that "[p]roceedings in *habeas corpus*, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results." *In re Williams*, 149 N.C. 436, 437, 63 S.E. 108, 109 (1908). Thus, while "no appeal as of right lies from an order entered in a habeas corpus proceeding, appellate review of such orders is available 'by petition for certiorari addressed to the sound discretion of the appropriate appellate court.' " *Chavez*, 374 N.C. at 470, 843 S.E.2d at 148 (quoting *State v. Niccum*, 293 N.C. 276, 278, 238 S.E.2d 141, 143 (1977)). "Such a petition should be filed with the clerk of the appellate court to which an appeal of right might have been taken from the judgment imposing the sentence which is the subject of inquiry in the habeas corpus proceeding." *Niccum*, 293 N.C. at 278, 238 S.E.2d at 143. In capital cases, the appropriate appellate court is the Supreme Court. N.C. R. App. P. 21(e). "In all other cases such petitions shall be filed in and determined by the Court of Appeals[.]" *Id.*

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4. Under North Carolina Rule of Evidence 201, we take judicial notice of this fact from the Department of Public Safety website's offender search results. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019). *See, e.g.*, *State v. Harwood*, 243 N.C. App. 425, 427 n.2, 777 S.E.2d 116, 118 n.2 (2015) (taking judicial notice of same).

¶ 11 As noted above, Petitioner filed his petition for habeas corpus in Wake County Superior Court on 15 June 2020 and the trial court denied it the same day. The next day, Petitioner filed a petition for writ of certiorari with our Court requesting review of the trial court's denial of his petition for habeas corpus. We granted the petition for certiorari. The trial court's order summarily denying the petition for habeas corpus is therefore properly before us.

III. Mootness

¶ 12 **[1]** Petitioner has been released from prison and is now serving the remainder of his sentence in the community. Petitioner has therefore received the relief requested in his petition and this case is moot.

¶ 13 Generally speaking,

> North Carolina appellate courts do not decide moot cases. A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint. Our purpose in exercising such restraint is to ensure that this Court does not determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions. As a general proposition, cases that have become moot should be dismissed.

Chavez, 374 N.C. at 467, 843 S.E.2d at 146-47 (internal marks and citation omitted).

¶ 14 However, "[t]he mootness doctrine is subject to exceptions, including the public interest exception, . . . and the 'capable of repetition, yet evading review' exception[.]' " *Id.*, 843 S.E.2d at 147. "Under the 'public interest' exception to mootness, an appellate court may consider a case, even if technically moot, if it involves a matter of public interest, is of general importance, and deserves prompt resolution." *Chavez v. Carmichael*, 262 N.C. App. 196, 203, 822 S.E.2d 131, 137 (2018) ("*Carmichael*") (internal marks and citation omitted), *vacated and reversed in part on other grounds sub nom. Chavez v. McFadden*,

374 N.C. 458, 843 S.E.2d 139 (2020). "Our appellate courts have previously applied the 'public interest' exception to otherwise moot cases of clear and far-reaching significance, for members of the public beyond just the parties in the immediate case." *Id.* at 203-04, 822 S.E.2d at 137 (citation omitted).

¶ 15 On the other hand,

> [a] case is "capable of repetition, yet evading review," when the underlying conduct upon which the relevant claim rests is necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future.

Chavez, 374 N.C. at 467-68, 843 S.E.2d at 147 (citation omitted). In the habeas context, "the 'capable of repetition, yet evading review' exception to the mootness doctrine is technically not available in . . . the absence of any indication that [the] petitioner[] [is] likely to find themselves in the same situation . . . in the future[.]" *Id.* at 468-69, 843 S.E.2d at 147-48.

¶ 16 At oral argument, counsel for Petitioner argued that the public interest exception to the mootness doctrine should apply in this case, if Petitioner were to be released from prison after oral argument but before we were able to issue an opinion. Petitioner was then released from Harnett County Correctional Institution to serve the remainder of his sentence in the community six days later.

¶ 17 We agree with Petitioner that the public interest exception to the mootness doctrine applies here. There are a number of petitions pending with our Court that have been held in abeyance until we issue an opinion in this case. Resolution of the questions presented by this appeal on the merits would therefore clearly affect "members of the public beyond just the parties in the immediate case." *Carmichael*, 262 N.C. App. at 203-04, 822 S.E.2d at 137. Accordingly, we hold that the public interest exception applies and will proceed to address the merits of the case.

IV. Standard of Review

¶ 18 "The decision concerning whether an application for a writ of habeas corpus should be summarily denied or whether additional proceedings should be conducted based upon the issuance of the requested writ is . . . a pure question of law." *State v. Leach*, 227 N.C. App. 399, 407, 742 S.E.2d 608, 613, *disc. rev. denied*, 372 N.C. 222, 747 S.E.2d 543 (2013).

Accordingly, our review of the trial court's denial of a petition for habeas corpus is *de novo*. *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

V. Summary Denial of a Petition for Habeas Corpus Alleging that an "Act, Omission, or Event" Has Occurred Entitling the Party to Discharge

¶ 19 **[2]** This case presents the question of whether a trial court errs when it summarily denies a petition for habeas corpus when the petition alleges that an "act, omission, or event" has occurred that entitles an incarcerated person to be discharged from custody. We hold that summary denial of such a petition is permissible, and that the trial court did not err in summarily denying the petition for habeas corpus in this case.

¶ 20 Our consideration of this question proceeds in four parts. First, we review the origins, evolution, and limits of the writ of habeas corpus under North Carolina law. Second, we parse the language of the statutory scheme governing petitions for habeas corpus in our General Statutes. Third, we review the trial court's order, which summarily denied the habeas petition without expressly stating whether an evidentiary proceeding was necessary.[5] Fourth, we turn to this question, and hold that the allegations in the petition and materials submitted in support thereof did not require the trial court to conduct an evidentiary hearing. As discussed in further detail *infra*, the allegations in the petition and the accompanying affidavits and materials did not create a forecast of admissible evidence individualized to the specific circumstances of Petitioner's case that an "act, omission, or event" had occurred that en-

5. The trial court's summary denial of the petition is itself an implicit resolution of this issue, of course. The absence of an express resolution of the issue in the order also is not entirely surprising. In the section of the current version of the *North Carolina Superior Court Judges' Benchbook* related to habeas corpus, only the general rule cited by the trial court in its order—N.C. Gen. Stat. § 17-4—is mentioned. *See* Jessica Smith, *Habeas Corpus* 3 (Mar. 2014), *in* North Carolina Superior Court Judges' Benchbook (noting that a petition for habeas corpus should be summarily denied when the court determines that the party is imprisoned "by virtue of a final order, judgment, or decree of a competent tribunal, or by virtue of an execution issued upon such final order, judgment or decree") (quoting N.C. Gen. Stat. § 17-4). The publisher of the *Benchbook* recently issued a bulletin noting several "well-recognized exceptions to [this] general rule[,]" including N.C. Gen. Stat. § 17-33(2), which provides for discharge "[w]here, . . . by some act, omission or event, . . . [a] party has become entitled to be discharged." *See* Ian A. Mance, "Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic," UNC School of Government, No. 2020/02 (June 2020) (quoting N.C. Gen. Stat. § 17-33(2)). However, as noted above, this exception is not mentioned in the *Benchbook*.

titled Petitioner to be discharged. For this reason, we hold that summary denial of the petition was proper. Accordingly, we affirm the order of the trial court.

A. Origins, Evolution, and Limits of the Writ of Habeas Corpus under North Carolina Law

1. Historic Development

¶ 21 The writ of habeas corpus under North Carolina law originates from the law of England. *In re Bryan*, 60 N.C. 1, 42 (1863). At common law, "every court of record of superior jurisdiction ha[d] power to issue the writ of *habeas corpus*[.]" *Id.* The writ "ar[ose] from the obligation of the king to protect all of his subjects in the enjoyment of their right of personal liberty, and for this purpose to inquire by his courts into the condition of any of his subjects." *Id.* Under English law,

> any person, whether imprisoned on a criminal charge or restrained of his liberty for any other cause, had a right during the sitting of the courts, by application to the court, and during the vacation by application to any one of the judges, to have the cause of his being imprisoned or restrained of his liberty inquired into without delay.

Id. at 44.

¶ 22 North Carolina's original habeas corpus act was "taken from [] two English statutes[.]" *Id.* at 43. Like English law, North Carolina's earliest habeas statutes "require[d] . . . any judge of the Supreme or Superior Court . . . to issue the writ of *habeas corpus* on the application of any person imprisoned on a criminal charge or otherwise restrained of his liberty." *Id.* From English law, the common law of North Carolina thus received

> the great Writ of Right, *habeas corpus* to bring any citizen alleged to be wrongfully imprisoned or restrained of his liberty, before the Court, with the cause of his arrest and detention, that the matter may be inquired of and the party set at liberty, if imprisoned against law.

Id. at 45. *See also* John V. Orth & Paul Martin Newby, The North Carolina State Constitution 75 (2013) (noting the reception of England's Habeas Corpus Act of 1679 by North Carolina before the adoption of the Constitution of 1776).

¶ 23 The Declaration of Rights of the North Carolina Constitution of 1776 did not expressly reference the writ, *see id.* at 20, but guaranteed the right of "every freeman restrained of his liberty[,] . . . to inquire into the lawfulness thereof, and to remove the same, if unlawful[,]" N.C. Const., Declaration of Rights § 13 (1776). The Constitution of 1868 expanded this guarantee to "every *person* restrained of his liberty[,]" N.C. Const. art. I, § 18 (1868) (emphasis added), and added an express guarantee to the writ for the first time, *id.* § 21 ("The privilege of the writ of habeas corpus shall not be suspended."). These constitutional guarantees were codified in the General Statutes in 1868. *See, e.g.*, *Harkins v. Cathey*, 119 N.C. 650, 664, 26 S.E. 136, 140 (1896) (Avery, J., dissenting) ("[W]hen the Constitution [of 1868] enjoined upon the Legislature the duty of providing a remedy, . . . they passed the statute[.]"); N.C. Gen. Stat. § 17-1 (2019) ("Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed."). The United States Supreme Court observed that same year that "[t]he great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex Parte Yerger*, 75 U.S. 85, 95 (1868) (emphasis in original).

¶ 24 Before the adoption of the Constitution of 1868, the authority of North Carolina courts to issue the writ was understood to be inherent in the judicial power. *See In re Bryan*, 60 N.C. at 43. Our Supreme Court had reasoned that the very

> establishment of a Supreme Court . . . invests it with power to inquire by means of this great Writ of Right . . . and if . . . the Legislature had in express terms denied the Court the power to issue this writ . . . , such prohibition would have been void and of no effect.

Id. See also id. at 44-45 ("Suppose, for the sake of argument, it was necessary that the power should be conferred on the Supreme Court by statute[,] we are of opinion that it is conferred by the Act establishing the Court."). After the adoption of the Constitution of 1868, however, this understanding evolved. *In re Schenk*, 74 N.C. 607, 608 (1876) ("The power to issue the writ of *habeas corpus* is derived from the Constitution . . . , and the Act of the Legislature for enforcing that provision[.]"). Thus, though the writ originated from the reception of English law by North Carolina and predates the Constitution of 1776, since the constitutionalization of the writ in 1868 and amendment of the habeas statutes that year, the authority of trial courts to issue the writ has been held to derive from the Constitution and General Statutes. *See id.*

¶ 25 The Declaration of Rights of the North Carolina Constitution of 1971, our current state Constitution, provides that "[e]very person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed." N.C. Const. art. I, § 21. Like § 21 of the Constitution of 1868, § 21 of the Constitution of 1971 contains an express guarantee to the writ and against its suspension. *See id.* Thus, Article I, §§ 18 and 21 of the Constitution of 1868 were combined and strengthened in Article I, § 21 of the Constitution of 1971, replacing "the frequently used subjunctive mood . . . [with] the imperative . . . to make clear that the provisions . . . are commands and not mere admonitions." John L. Sanders, *The Constitutional Development of North Carolina*, *in* North Carolina Government 1585-1974: A Narrative and Statistical History 803 (John L. Cheney, Jr., ed. 1975).[6]

¶ 26 The scope of habeas corpus jurisdiction has also evolved. "Traditionally, the writ of habeas corpus was thought to issue only to ascertain whether the court which imprisoned the person seeking the relief had jurisdiction of the matter or whether the court had exceeded its power." *Hoffman v. Edwards*, 48 N.C. App. 559, 561-62, 269 S.E.2d 311, 312 (1980) (citation omitted). However, through the enactment of N.C. Gen. Stat. § 17-33(2), our General Assembly expanded "the scope of a court's habeas corpus jurisdiction to include those instances '[w]here, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.' " *In re Stevens*, 28 N.C. App. 471, 474, 221 S.E.2d 839, 840 (1976) (quoting N.C. Gen. Stat. § 17-33(2)). Thus, while "at common law, [the writ] was not thought to issue to review all deprivations of liberty[,]" *Hoffman*, 48 N.C. App. at 563, 221 S.E.2d at 313, "it is clear now that the scope of a court's habeas corpus jurisdiction is much broader[,]" *id.* at 562, 221 S.E.2d at 312. *See also id.* at 563, 221 S.E.2d at 313 ("It is only through legislative grace that the remedy has been extended.").

¶ 27 However, "[t]hough obviously essential to the maintenance of civil liberty, the writ is not unlimited in its jurisdictional scope, utility and

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6. *Compare* N.C. Const. art. I, § 18 (1868) ("Every person restrained of his liberty, is entitled to a remedy to enquire into the lawfulness thereof and to remove the same, if unlawful, and such remedy ought not be denied or delayed.") *with* N.C. Const. art. I, § 21 (1971) ("Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy *shall* not be denied or delayed.") (emphasis added). Section 21 of the Constitution of 1971 is codified at N.C. Gen. Stat. §§ 17-1, -2. *Hoffman v. Edwards*, 48 N.C. App. 559, 561, 269 S.E.2d 311, 312 (1980).

function." *In re Stevens*, 28 N.C. App. at 473, 221 S.E.2d at 840. It is not "allowed as a substitute for an appeal, and where an appeal lies, such course should be pursued." *In re Coston*, 187 N.C. 509, 512, 122 S.E. 183, 185 (1924). Moreover, "[w]hen the legislature has provided an effective administrative remedy, it is exclusive[,] . . . and [a] party . . . [must] exhaust his administrative remedies before resorting to the courts." *Hoffman*, 48 N.C. App. at 563, 269 S.E.2d at 313 (internal marks and citation omitted). N.C. Gen. Stat. § 148-11 specifically authorizes the Secretary of DPS to "adopt rules for the government of the State prison system[,]" including "rules that pertain to enforcing discipline[,]" N.C. Gen. Stat. § 148-11(a) (2019), and we have held that generally speaking, issues such as a prisoner's "grade of conduct, privileges, disciplinary action and commendations are strictly administrative and not judicial matters[,]" *In re Stevens*, 28 N.C. App. at 474, 221 S.E.2d at 841 (internal marks and citation omitted). In other words,

> the difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy, and rightfully lie within the sole administrative jurisdiction of our State governmental departments, and are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny.

Id. (citation omitted).

2. Modern Development: State v. Leach

¶ 28 No discussion of the origins and evolution of the writ of habeas corpus under North Carolina law would be complete if it did not include *State v. Leach*, 227 N.C. App. 399, 742 S.E.2d 608 (2013), our Court's most significant recent decision on the subject. *Leach* involved a prisoner who was denied parole after entering into an agreement under the Mutual Agreement Parole Program ("MAPP") and working on work release under the terms of the agreement for over a year. *Id.* at 401, 742 S.E.2d at 609-10. After the prisoner had performed substantially under the MAPP contract, the Parole Commission notified him that it was terminating the contract and denying his parole based on "a substantial risk . . . [he] would not conform to reasonable conditions of parole and would engage in further criminal conduct." *Id.* at 401, 742 S.E.2d at 610 (internal marks omitted).

¶ 29 The prisoner thereafter filed a grievance challenging the termination of the contract and the denial of his parole but was unsuccessful. *Id.* He then petitioned the Moore County Superior Court for issuance of

a writ of habeas corpus, alleging that the termination of the contract and denial of his parole violated his rights to due process and to be free from retroactive application of the criminal law. *Id.* at 401, 409, 742 S.E.2d at 610, 614. The trial court, like the trial court in this case, summarily denied the petition, citing N.C. Gen. Stat. § 17-4(2).[7] *Id.* at 401, 742 S.E.2d at 610.

¶ 30 Mr. Leach then petitioned our Court for certiorari to review the trial court's summary denial of his petition for habeas corpus, which we granted. *Id.* at 402, 742 S.E.2d at 610. After reviewing the relevant statutory provisions, we began our discussion with the observation that "[t]he summary nature of the proceedings to be conducted following the return of a writ of habeas corpus reflects the fact that 'their principal object [is] a release of a party from illegal restraint' and that such proceedings would 'lose many of their most beneficial results' if they were not 'summary and prompt.' " *Id.* at 404, 742 S.E.2d at 612 (quoting *State v. Miller*, 97 N.C. 451, 454, 1 S.E. 776, 778 (1887)).

¶ 31 "However," we reasoned, "the resulting proceedings should not be 'perfunctory and merely formal'; instead, relevant facts, 'when controverted, may be established by evidence like any other disputed fact.' " *Id.* (quoting *In re Bailey*, 203 N.C. 362, 365-66, 166 S.E. 165, 166 (1932)). We also noted that "[t]he statutory provisions governing habeas corpus proceedings contain no indication that a trial judge must make findings of fact and conclusions of law in the course of determining whether an application for the issuance of a writ of habeas corpus should be summarily denied[,]" explaining that the "purpose sought to be achieved by requiring a trial court to make specific findings of fact and conclusions of law is to enable a reviewing court to determine the legal and factual basis for the trial court's decision." *Id.* at 405-06, 742 S.E.2d at 612-13 (citation omitted). We held that the trial court's determination of whether to summarily deny a petition for habeas corpus or conduct an evidentiary hearing on the petition must be based on "the face of the applicant's application, including any supporting documentation," and nothing more, and that in a summary denial of a petition for habeas corpus, no findings of fact or conclusions of law are required. *Id.* at 406-07, 742 S.E.2d at 613.

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7. This subsection provides the general rule referenced in the previous footnote, that a petition for habeas corpus is subject to summary denial if the party is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." N.C. Gen. Stat. § 17-4(2) (2019).

¶ 32 On the merits, we affirmed the trial court's summary denial of the petition, but for a different reason than the one given by the trial court. *Id.* at 413-15, 742 S.E.2d at 617-19. We noted at the outset of our merits discussion that

> [a]s a result of the fact that habeas corpus is available in instances in which, "though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged," N.C. Gen. Stat. § 17-33(2), the extent to which an imprisoned individual is entitled to challenge parole-related decisions by means of an application for the issuance of a writ of habeas corpus has been the subject of litigation before this Court on a number of occasions.

Id. at 409, 742 S.E.2d at 615. We also reiterated that "habeas corpus relief is not available in connection with an incarcerated individual's challenge to an administrative decision, . . . unless the inmate has exhausted any available administrative remedies and unless some clear constitutional violation has occurred." *Id.* at 411, 742 S.E.2d at 616.

¶ 33 We went on to affirm the trial court's summary denial of the petition because Mr. Leach had failed to make a threshold showing in his application that a material issue of fact existed as to whether an "act, omission, or event" had occurred entitling him to discharge. *See id.* at 413-15, 742 S.E.2d at 617-19. Although Mr. Leach had *argued* he had fully performed under the terms of the MAPP contract, we were unable to evaluate this argument based on the petition and materials submitted in support thereof because a full copy of the MAPP contract had not been included. *Id.* 413-14, 742 S.E.2d at 617-18. Thus, while Mr. Leach had appropriately exhausted his available administrative remedies, *id.* at 411, 742 S.E.2d at 616, we ultimately concluded that he had not provided the forecast of admissible evidence necessary to demonstrate an evidentiary hearing on his constitutional claims was required, *see id.* at 414, 742 S.E.2d at 618. Accordingly, we affirmed the order of the trial court, although not on the original basis cited in the trial court's order—N.C. Gen. Stat. § 17-4(2).

3. The State's Argument Based on the Plain Language of N.C. Gen. Stat. § 17-33

¶ 34 *Leach* is directly relevant to the State's primary argument in this case. Specifically, the State's argument here is based on a reference in

N.C. Gen. Stat. § 17-33 to "civil process." The statute provides in relevant part that

> if it appears on the return to the writ that the party is in custody by virtue of *civil process* from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:
>
> . . .
>
> (2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged.

N.C. Gen. Stat. § 17-33 (2019) (emphasis added).

¶ 35 The State argues that the reference to "civil process" in N.C. Gen. Stat. § 17-33 means that the statute does not apply to individuals who are imprisoned because of a conviction and sentence imposed for a violation of the criminal law. We disagree, and reject the State's argument for three reasons: (1) it is contrary to our decision in *Leach*; (2) it is inconsistent with the language of § 17-33; and (3) it ignores the historic development of the writ of habeas corpus and the intent of the General Assembly expressed in § 17-33.

¶ 36 The State made a similar argument in *Leach* to the one it now makes. There, the State had suggested that we decline to follow *Hoffman* and disavow our observation that N.C. Gen. Stat. § 17-33(2) "allow[s] an incarcerated individual to obtain discharge despite having originally been imprisoned pursuant to a valid judgment." 227 N.C. App. at 410 n.4, 742 S.E.2d at 615, n.4. We rejected this argument and instead concluded that "we lack[ed] the authority to act on [the State's] suggestion[,]" *id.*, citing our Supreme Court's holding in *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). *See id.* at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 37 While the State's argument here is not the same argument that we expressly rejected in *Leach*, our holding in *Leach* requires us to reject it here. Accepting the State's argument that N.C. Gen. Stat. § 17-33 does not apply in criminal cases because the statute contains a reference to "civil process" would require us to overrule our decisions in *Leach*, *In re*

Stevens, and *Hoffman*. *See Leach*, 227 N.C. App. at 409, 742 S.E.2d at 615 (noting "the fact that habeas corpus is available in instances in which, 'though the original imprisonment was lawful, yet by some act, omission or event, . . . the party has become entitled to be discharged' "); *In re Stevens*, 28 N.C. App. at 474, 221 S.E.2d at 840 (same); *Hoffman*, 48 N.C. App. at 562, 269 S.E.2d at 312 ("Whatever the case may have been, it is clear now that the scope of a court's habeas corpus jurisdiction is much broader [than at common law.]"). This is something we cannot do. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

¶ 38 The State's argument is also inconsistent with the language of § 17-33. As Petitioner's counsel pointed out at oral argument, acceptance of the State's argument based on the reference to civil process in § 17-33 would require us to ignore the second clause of the same sentence of the statute, which disjunctively provides for issuance of the writ in the alternative "by any officer in the course of judicial proceedings before him[.]" N.C. Gen. Stat. § 17-33 (2019). It is axiomatic that "[a]ll parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (citation omitted). We have even made this observation specifically in the habeas context. *Hoffman*, 48 N.C. App. at 564, 269 S.E.2d at 313 ("Statutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each."). Consequently, "a provision will not be read in a way that renders another provision of the same statute meaningless." *Brown v. Brown*, 112 N.C. App. 15, 21, 434 S.E.2d 873, 878 (1993) (citation omitted).

¶ 39 Finally, the State's argument ignores the historic development of the writ and the intent of the General Assembly reflected in § 17-33. We must be mindful of the longstanding "presumption [] that the legislature was fully cognizant of prior and existing law within the subject matter of its enactment." *Biddix v. Henredon Furniture Indus., Inc.*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) (citation omitted). We must presume that the General Assembly of 1868—the same General Assembly that drafted and approved the Constitution of 1868 before it was ratified by a popular vote in April of that year, *see* Sanders, *supra* at 796—was aware of the ancient origins of the writ and North Carolina's reception of the English Habeas Corpus Act of 1679 before the adoption of the Constitution of 1776, and further, that our Supreme Court at that time believed the General Assembly lacked the authority to deprive the Court of jurisdiction over the writ. With this knowledge, the General

Assembly of 1868 made two important choices: (1) to constitutionalize the writ and a guarantee against its suspension in §§ 18 and 21 of the Constitution of 1868; and (2) to broaden the scope of habeas corpus jurisdiction from its origins at common law by enacting § 17-33. Setting aside our Court's own precedent requiring us to reject the State's argument about the applicability of § 17-33 in criminal cases, we cannot ignore these legislative choices.

¶ 40 Moreover, decisions by our Supreme Court contemporaneous with the enactment of § 17-33 do not support reading the reference to civil process in the statute to refer to civil as opposed to criminal litigation. Instead, the principle reflected in the statutory reference to civil process is that the writ of habeas corpus is a feature of civil government, and specifically, a feature of the civilian rather than military system of justice. Several years before the statute or the Constitution of 1868 were adopted, during the Civil War, our Supreme Court confirmed this principle by denying petitions for habeas corpus by Confederate soldiers awaiting trial by Confederate courts martial. *Cox v. Gee*, 2 Win. 131, 132 (1864). As the Court observed in *Cox*, "[a] soldier, bound to service in the army, when once enrolled and assigned his post of duty, is in military custody, and no longer at liberty to go about at will." *Id.* "Legitimate inquiry in such cases goes only to the extent of ascertaining whether the prisoner is rightfully in the army[,]" the Court held. *Id.* at 133. The year before, the Court had confirmed the converse: "the Court . . . ha[d] jurisdiction . . . to discharge [a] *citizen* whenever it appear[ed] that he [was] unlawfully restrained of his liberty by an officer of the Confederate States." *In re Bryan*, 60 N.C. at 19 (emphasis added). Likewise, two years after the adoption of the Constitution of 1868 and the enactment of § 17-33, the Court held that a military officer detaining a civilian could not lawfully ignore the command of a writ of habeas corpus issued by a civilian court. *In re Moore*, 64 N.C. 802, 808-10 (1870).

¶ 41 *Cox*, *In re Bryan*, and *In re Moore* demonstrate that the reference in § 17-33 to civil process codified a distinction between civil and *military* systems of justice rather than civil and *criminal* litigation. We therefore do not construe the reference in § 17-33 to "civil process" to mean the statute is inapplicable to people who are imprisoned after being convicted and sentenced for violations of the criminal law. Accordingly, we reiterate our holding in *Leach* that an incarcerated person may petition for issuance of a writ of habeas corpus under § 17-33(2) based on the occurrence of an "act, omission, or event" entitling the party to discharge, even though the writ would not have issued in such cases at common law. *See* 227 N.C. App. at 410 n.4, 742 S.E.2d at 615 n.4.

B. The Statutory Scheme Governing Writs of Habeas Corpus

¶ 42 Chapter 17 of the General Statutes contains the habeas statutes. Section 17-3 provides:

> [e]very person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in cases specified in G.S. 17-4, may prosecute a writ of habeas corpus, according to the provisions of this Chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom.

N.C. Gen. Stat. § 17-3 (2019).[8]

¶ 43 The petition may be made by a party or any person on behalf of a party, *id.* § 17-5, and may be directed to any superior or appellate court judge, *id.* § 17-6. It "must allege . . . that the party 'is imprisoned or restrained of his liberty,' the location of the party's imprisonment, the person restraining the imprisoned party, '[t]he cause or pretense of such imprisonment or restraint,' and [include] [] supporting documents." *Chavez*, 374 N.C. at 469, 843 S.E.2d at 148 (quoting N.C. Gen. Stat. § 17-7(1)-(3)).

¶ 44 If the petition has merit, the judge to whom it is presented "shall grant the writ without delay," N.C. Gen. Stat. § 17-9 (2019); however, the petition must be denied if "it appear[s] from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is . . . prohibited from prosecuting the writ." *Id.* The court's determination whether to grant or deny the petition must be based on "the face of the applicant's application, including any supporting documentation[.]" *Leach*, 227 N.C. App. at 406, 742 S.E.2d at 613. Accordingly, "the reviewing judge must determine if the application, on its face, provides a basis for believing that the applicant is, in fact, entitled to be discharged from imprisonment or restraint and must, if it does, issue a writ of habeas corpus." *Id.* at 405, 742 S.E.2d at 612.

¶ 45 If the petition is granted and the writ issues, "[t]he person or officer on whom the writ is served must make a return thereto in writing," either immediately or at the time specified in the writ, N.C. Gen. Stat.

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8. Scholarly commentators have noted that "[t]he word chosen, 'restraint,' is intentionally comprehensive and includes all sorts of confinement, not limited to jails and prisons." Orth & Newby, *supra* at 75. "The remedy to which everyone is entitled, although somewhat obscured by the punctuation, is twofold: to inquire into the lawfulness of the restraint and to remove it if unlawful." *Id.*

§§ 17-14, -13 (2019), "stating whether the individual upon whom the writ is served 'has or has not the party in his custody or under his power or restraint' and, if so, 'the authority and the cause of such imprisonment or restraint[,]' along with any documents supporting the imprisonment or restraint[,]" *Chavez*, 374 N.C. at 470, 843 S.E.2d at 148 (quoting N.C. Gen. Stat. § 17-14(1)-(3)). After the return is made, the judge who issued the writ is required to

> examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and *if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge*, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party.

N.C. Gen. Stat. § 17-32 (2019) (emphasis added). Thus, "[a]fter the writ has been served and the custodial officer makes the required return, the trial court must make the factual and legal decisions necessary to determine whether the applicant is, in fact, lawfully imprisoned or restrained utilizing such procedures as suffice to adequately resolve any relevant issues of law or fact." *Leach*, 227 N.C. App. at 405, 742 S.E.2d at 612.

¶ 46 North Carolina General Statutes §§ 17-33 and -34 respectively govern discharge and remand, possible dispositions after a return of a writ. *See* N.C. Gen. Stat. §§ 17-33, -34 (2019). "A party petitioning for the issuance of a writ of habeas corpus shall be discharged '[i]f no legal cause is shown for such imprisonment or restraint, or for the continuance thereof.' " *Chavez*, 374 N.C. at 469, 843 S.E.2d at 148 (quoting N.C. Gen. Stat. § 17-33). If the petitioner is not successful in obtaining discharge, the party must be remanded to custody. *See* N.C. Gen. Stat. § 17-34 (2019). Section 17-33 provides that discharge is proper in the following circumstances:

> (1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.
>
> (2) *Where, though the original imprisonment was lawful, yet by some act, omission or event, which*

> *has taken place afterwards, the party has become entitled to be discharged.*
>
> (3) Where the process is defective in some matter of substance required by law, rendering such process void.
>
> (4) Where the process, though in proper form, has been issued in a case not allowed by law.
>
> (5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him.
>
> (6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.

Id. § 17-33 (emphasis added). Regarding remand, § 17-34 provides:

> It is the duty of the court or judge forthwith to remand the party, if it appears that he is detained in custody, either—
>
> (1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.
>
> (2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.
>
> (3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.
>
> (4) That the time during which such party may be legally detained has not expired.

Id. § 17-34.

¶ 47 A petition may also be summarily denied. Section 17-4 provides:

> Application to prosecute the writ shall be denied in the following cases:
>
> (1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts

> or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts.
>
> (2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.
>
> (3) Where any person has willfully neglected, for the space of two whole sessions after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a habeas corpus in vacation time for his enlargement.
>
> (4) Where no probable ground for relief is shown in the application.

Id. § 17-4. Largely mirroring the remand statute, § 17-34, § 17-4(2) thus provides the general rule that summary denial of a petition is proper if a party is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." *Id.* § 17-4(2).

¶ 48 However, this general rule appears to conflict with § 17-33(2), which appears to require summary denial of a petition where a party is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," *id.* § 17-4(2), when remand would be required, *id.* § 17-34(2), while § 17-33 requires discharge rather than remand if, "though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged[,]" *id.* § 17-33(2). Reading § 17-4 without reference to § 17-33 could lead a court reviewing a habeas petition to mistakenly conclude that a party "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction," *id.* § 17-4(2), was "prohibited from prosecuting the writ[,]" *id.* § 17-9, resulting in summary denial of the petition without resolving whether because of "some act, omission or event, . . . the party has become entitled to be discharged[,]" *id.* § 17-33(2), as happened in *Leach*. *See* 227 N.C. App. at 401, 742 S.E.2d at 610. That is also what appears to have happened here.

¶ 49 We have held that these provisions "must be construed in pari materia, and harmonized, if possible, to give effect to each." *Hoffman*, 48 N.C. App. at 564, 269 S.E.2d at 313. "It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *In pari materia*, Black's Law Dictionary (11th ed. 2019). To give meaning to every word of § 17-33 and harmonize the apparent conflict between § 17-33(2) and § 17-4(2) in light of the legislative intent expressed in § 17-33(2), we hold that § 17-33(2) provides an exception to the general rule provided by § 17-4(2). We note that this holding is implied by our holdings in *In re Stevens*, *Hoffman*, and *Leach*—and, indeed, is required by our Court's controlling precedent on this question—but we make it expressly here.

C. The Trial Court's Summary Denial of the Petition for Habeas Corpus in The Present Case

¶ 50 In the present case, the trial court ordered in relevant part as follows:

> Petitioner has a long history of respiratory illness, which includes coughing up blood and extreme difficulty breathing. Furthermore, he was treated for bronchitis in May 2020 and pleurisy of the lungs on June 10, 2020. Petitioner is housed at Harnett Correctional Institute. On June 6, 2020, Harnett Correctional Institute had an inmate with a positive test for COVID-19. Petitioner argues that "some act, omission, or event, which has taken place afterwards, the party has become entitled to be discharged."
>
> . . .
>
> A petition for a writ of habeas corpus shall be denied where a person is held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction. N.C. Gen. Stat. § 17-4(2) (2019). Upon review of the judgments presented attached to this petition, these judgments are valid final judgments entered by a court with proper jurisdiction.
>
> Pursuant to N.C. Gen. Stat. § 17-4(2), the Court concludes as a matter of law that the Defendant is confined by virtue of valid final judgments entered by a court of competent jurisdiction. Therefore,

> Defendant's application/petition for writ of habeas corpus is summarily denied.

¶ 51 The order under review is thus more detailed than required under our holdings in *Leach*. We repeat these holdings in relevant part here:

> (1) the decision concerning whether an application for a writ of habeas corpus should be summarily denied is a pure question of law;
>
> (2) a trial judge need not make findings of fact when the question before the court is purely legal in nature;
>
> (3) we review whether an application for a writ of habeas corpus should be summarily denied using a *de novo* standard of review; and
>
> (4) a petitioner for habeas corpus must provide us with sufficient information to establish the accuracy of the factual predicate underlying the challenge to the trial court's order.

See 227 N.C. App. at 406-07, 414, 742 S.E.2d at 613, 618.

¶ 52 In this case, though the trial court entered a reasoned order articulating a rationale for the denial of the petition, doing so was not required, and our review of the trial court's decision is *de novo*. Accordingly, as in *Leach*, whether we affirm or reverse the order does not depend on whether we agree on appeal that the trial court cited the correct legal basis for summary denial of the petition. We now turn to whether the trial court erred on the merits.

D. The Necessity of Conducting an Evidentiary Hearing Based on the Allegations in the Petition and Accompanying Materials

¶ 53 The question on the merits is whether the application provided a "*colorable basis* for concluding that [Petitioner's] claim to have a protected liberty interest in his release from confinement . . . ha[d] merit." *Id.* at 411-12, 742 S.E.2d at 616 (emphasis added). We conclude that it did not. As in *Leach*, Petitioner in this case failed to make a threshold showing of a forecast of admissible evidence that was individualized to the circumstances of *his* case that there was a material issue of fact as to whether an "act, omission, or event" had occurred entitling him to discharge. *See id.* at 411-12, 742 S.E.2d at 616. We therefore affirm the order of the trial court, though for a different reason than the one provided in the trial court's order, N.C. Gen. Stat. § 17-4(2).

¶ 54 Petitioner alleged in his application that his imprisonment at the Harnett Correctional Institution violated the Eighth Amendment to the United States Constitution and Article I, § 27 of the North Carolina Constitution. Petitioner alleged in relevant part as follows:

> [U]pon information and belief, [Petitioner] has a long history of respiratory illness and is currently coughing up blood, has had extreme difficulty breathing over the last several months, was treated for bronchitis in May 2020 with prednisone and antibiotics, on June 10[,] 2020 was diagnosed and treated with pleurisy of the lungs, has been given a second round of antibiotics to be taken over 21 days, an inhaler with prednisone, and continuing breathing treatments.
>
> . . .
>
> On June []6, 2020, the Harnett Correctional Institute, although still unreported on the [] DPS website, had an inmate with a positive test for COVID-19. [] DPS will not conduct mass testing at a facility and will only conduct tests upon those individuals who show symptoms. Since June []6, the L dorm, which has 4 pods, where the inmate who tested positive [lives], is in complete lockdown. Furthermore, Harnett County and [] DPS make much ado of Power Breather Machines, yet those machines were removed from Harnett Correctional on June []3, 2020.
>
> Despite the measures taken to date by . . . DPS and Harnett Correctional, and not having any previous positive cases, it is clear that the facility is incapable of ensuring that [Petitioner] not be exposed to COVID-19. [] DPS's safety measures have been in place for over two months at the Harnett Correctional Institution and still an inmate was exposed to and contracted COVID-19 and displayed symptoms. Much can be said of other inmates who may be asymptomatic and pose a serious risk of harm to [Petitioner]. [Petitioner's] physical condition places him at extreme risk of death should he contract the respiratory illness COVID-19.
>
> Furthermore, over the last several days North Carolina has seen a surge in COVID-19 cases and the

> [Centers for Disease Control ("CDC")] projects [an] increase in deaths due to COVID-19.
>
> . . .
>
> The CDC has explicitly highlighted that jails and detention centers are ideal environments for the spread of contagious diseases. In an interim guidance issued on March 23, 2020[,] the CDC stated: "Incarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced."
>
> . . .
>
> [I]t is clear that due to [Petitioner's] medical history and condition, [] DPS's continued actions that directly place [Petitioner] in harm's way, DPS's inability to protect [Petitioner] from contracting COVID-19, and the very serious risk of death for [Petitioner], that [Petitioner's] continued confinement is both "cruel and unusual" and "cruel or unusual" under the Eighth Amendment to the [United States] Constitution and Article 1, § 27 of the North Carolina Constitution, respectively.

(Citations omitted.)

¶ 55 In support of his allegations regarding his "extreme risk of death . . . [from] COVID-19[,]" Petitioner submitted voluminous materials. These materials included an affidavit by himself, an affidavit by his wife, letters he had written while incarcerated containing contemporaneous notes about his medical treatment and symptoms, data from the CDC's website and from DPS's website about COVID-19, the declarations of several expert witnesses filed in litigation related to COVID-19 and prison conditions in federal court in other states, and his medical records from his time in the custody of DPS. Notably absent from these materials was any affidavit, declaration, or other report of any kind of an expert Petitioner had retained to offer an opinion or testify about Petitioner's elevated risk of severe illness or other medical complications from COVID-19 based on an examination of Petitioner or review of his medical records. Nor did Petitioner provide any medical records in support of his petition that predated his time in the custody of DPS that documented the diagnosis, treatment, and severity of the medical conditions from which he allegedly suffers.

¶ 56 Instead, aside from the affidavits by himself and his wife and his DPS medical records, the materials submitted in support of Petitioner's allegations—like many of the allegations themselves—all generally concerned the dangers of COVID-19 in congregate living conditions such as prisons and data about COVID-19 cases in North Carolina's prisons. General information such as this could have supported similar claims raised by *any* prisoner in DPS custody experiencing medical conditions or other COVID-19 comorbidities. Although this information supported many of the allegations in the petition, absent from the materials submitted in support of the petition was an evidentiary link between the general dangers of COVID-19 in congregate living conditions like prisons and the specific medical conditions from which Petitioner allegedly suffers.

¶ 57 The absence of an evidentiary link between the general information in the application and the specific circumstances of Petitioner's medical conditions—aside from the affidavits by Petitioner and his wife—left an evidentiary gap in the materials submitted in support of the petition that we hold was fatal to Petitioner's ability to demonstrate in the application that there was a "colorable basis for concluding that [Petitioner's] claim[s] . . . ha[d] merit." *Leach*, 227 N.C. App. at 412, 742 S.E.2d at 616. Simply put, the materials submitted in support of the petition did not show how Petitioner's medical conditions put *him* at an elevated risk for serious illness or other medical complications from COVID-19, much less an "extreme risk of death . . . [from] COVID-19."

¶ 58 In his affidavit, Petitioner averred in relevant part as follows:

> 6. There are over 600 inmates here at Harnett Correctional Institution. Many are sick, coughing, and sick calls are taking up to 6 weeks to be seen.
>
> 7. I was diagnosed with asthma prior to becoming incarcerated and I have an albuterol inhaler to this date in Harnett Correctional Institution.
>
> 8. There are no masks, gloves, or sanitizer, and our beds are less than 3 feet apart. There is black mold from the walls to the ceilings.
>
> 9. As the pandemic COVID-19 is rapidly spreading in the other prisons near Harnett Correctional Institution, some of our correctional officers have been working at the Neuse Prison for the last week, and their cases have jumped from 80 to almost 300.

> 10. There hasn't been any COVID-19 testing done here at Harnett Correctional Institution yet, and I fear for my life as the COVID-19 begins to spread closer and closer to us here.
>
> 11. With me having asthma, I fear for my life that I will die in here once the COVID-19 spreads in here, as more and more inmates are getting sick.

Though this affidavit was not dated, as the trial court's order reflects, by the time the petition was filed on 15 June 2020, some COVID-19 testing had been conducted at Harnett Correctional Institute, detecting a positive case on 6 June 2020.

¶ 59 Petitioner's wife averred in her affidavit in relevant part as follows:

> 3. [Petitioner] has asthma and throughout the 16+ years I've known him and have lived with him, I have witnessed his asthma and respiratory conditions worsening as he gets older.
>
> 4. [Petitioner] has been a carpenter for 23 years and has been exposed to asbestos due to the renovation of approximately 27 historic homes.
>
> 5. [Petitioner] has also been exposed to a lot of black mold due to the repairing of a little over 100 storm, flood, and hurricane-damaged homes. These exposures to asbestos and black mold were over a 17 to 19 year span and his respiratory health declined.
>
> 6. [Petitioner] also served as a firefighter for the Turkey Fire Department and was exposed to severe smoke inhalation for a couple of years.
>
> 7. Prior to [Petitioner] losing his trial and being incarcerated, he has had a rescue inhaler prescription with an expiration date of February 2020 (RX 6446327). He has a nebulizer (breathing treatment) and Albuterol medications to be used as needed daily. [Petitioner] has been on and off prednisone and antibiotics due to his lungs developing respiratory infections, frequent bronchitis, and asthma have all worsened with age.
>
> 8. As his wife, I have witnessed his breathing and asthma worsening. Smokey, not well ventilated, hot,

> and moldy prison environments increase the severity of his health conditions with his labored breathing, comprised [sic] lungs, asthma, respiratory infections, and frequent bronchitis.
>
> . . .
>
> 10. The deadly COVID-19 virus is now in the prisons and Harnett Correctional Facility where my husband currently lives.
>
> 11. I fear that with [Petitioner's] medical history prior to being incarcerated and with his current health conditions declining, vulnerability of his lungs, worsening of his asthma, and respiratory infections, that if he contracts this deadly COVID-19 virus, his chances of losing his life are so much greater due to this environment.
>
> 12. His immune system is not strong enough to combat this virus successfully.
>
> . . .
>
> 15. Harnett Correctional Institution's environment, like all of the other prisons, is not safe for [Petitioner's] well-being due to him being at a higher risk due to his asthma and the conditions of his lungs and breathing.
>
> 16. Most importantly, if he were to contract the deadly COVID-19 virus that is now present in Harnett Correctional Institution (and the other prisons) he would more likely succumb to the virus's wrath.
>
> 17. With the prison facilities' environment – smoke-filled air, lack of ventilation and air conditioning, black mold, beds less than 3ft [sic] apart, and COVID-19 present now – [Petitioner] would most likely not survive if he is exposed to the virus.

¶ 60 A review of these affidavits discloses an evidentiary forecast of four important facts to which Petitioner and his wife could have testified at an evidentiary hearing: (1) Petitioner had been diagnosed with asthma and other respiratory illness and had been prescribed medication for these conditions; (2) Petitioner was imprisoned at Harnett Correctional Institution, where there was no known COVID-19 outbreak but outbreak

was certainly possible and perhaps likely because of conditions at the prison; (3) Petitioner had been engaged in vocational activities prior to his imprisonment that worsened his respiratory illness as he aged; and (4) perhaps most predominantly, Petitioner and his wife feared for his life while he was incarcerated during a pandemic in conditions rendering many precautionary measures recommended for minimizing the risk of COVID-19 impossible for Petitioner, like so many other prisoners confined in jails and prisons in North Carolina.

¶ 61 Generally speaking, "[e]very person is competent to be a witness[.]" N.C. Gen. Stat. § 8C-1, Rule 601(a) (2019). Petitioner and his wife certainly could testify as fact witnesses under the limits of Rule 602 of the North Carolina Rules of Evidence regarding their knowledge of Petitioner's medical history and the severity of the symptoms of his asthma and other respiratory illness and any medications he had taken or other treatment he had received. *See id.*, Rule 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). However, based on the record before us, neither are possessed of expert qualifications on averments in their affidavits important to bridge the gap between the individual circumstances of Petitioner's case and *his* medical conditions and the general information in the application about the dangers of COVID-19 to people with respiratory conditions and the increased risk of COVID-19 in prison.[9]

¶ 62 We do not mean to suggest that we doubt the sincerity or question in any way the legitimacy of Petitioner and his wife's fears for his life

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9. Rule 702 of the North Carolina Rules of Evidence sets forth the following general standard for the admissibility of expert testimony:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2019). The record does not contain any indication that Petitioner or his wife meet the general standard provided by Rule 702 for admissible expert testimony related to Petitioner's prognosis while in prison and his increased risk of serious illness or complications from COVID-19 because of his medical conditions.

while imprisoned during a pandemic. We do, however, conclude that the averments in the affidavits by Petitioner and his wife and the other materials submitted in support of the petition fail to demonstrate that any testimony Petitioner or his wife might offer about his prognosis and increased risk of serious illness or complications from COVID-19 because of his health conditions would be admissible expert testimony under Rule 702. Nor would these averments qualify as admissible lay opinion testimony under Rule 701, which limits the admissibility of lay witness testimony "in the form of opinions or inferences . . . to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.*, Rule 701 (2019). While "a lay witness may give an opinion concerning the state of a person's health[,]" *State v. Galloway*, 304 N.C. 485, 491, 284 S.E.2d 509, 514 (1981) (citation omitted), only an expert can give competent evidence of "complicated medical questions far removed from the ordinary experience and knowledge of laymen," *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). The averments related to Petitioner's heightened probability of severe illness or complications from COVID-19 belong to the latter category.

¶ 63 All that is left to bridge the evidentiary gap we have identified as the fatal defect in Petitioner's application are his medical records while in the custody of DPS. We conclude that these medical records do not demonstrate what the prognosis for Petitioner's asthma and other respiratory illness in prison is or what the increased risk of serious illness or complications from COVID-19 to Petitioner would be. This is not particularly surprising based on the constraints under which the medical staff at the prison were working during the time the records were created and the role of these staff at the prison, which is not forensic. These records also document numerous medical visits while Petitioner was in prison when he denied having a history of past respiratory conditions, including denying that he had asthma.

¶ 64 In fact, based on these medical records, the first time DPS became aware of Petitioner's asthma and history of respiratory illness was when he was first diagnosed with mild intermittent asthma on 8 May 2020, once news of the pandemic was widespread. This detail, while not by itself dispositive, combined with the lack of individualized evidentiary support in the application, undermines Petitioner's credibility related to his averments and contemporaneous notes about the severity of his medical conditions in our assessment, as does the fact that all of his crimes involve dishonesty. Ordinarily, we do not make credibility assess-

ments as an appellate court. *See*, *e.g.*, *Headen v. Metro. Life Ins. Co.*, 206 N.C. 860, 862, 175 S.E. 282, 283 (1934) ("It is not a matter for review on appeal that the jury declined to believe the evidence of one of the parties, or that the trial court refused to set aside the verdict as against the weight of the evidence."). However, on *de novo* review of a pure question of law, we must consider what weight the trial court should have given the evidentiary support in the application. *See* N.C. Gen. Stat. § 17-32 (2019) (requiring an evidentiary hearing only where "issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge"). As far as Petitioner's medical records while in the custody of DPS are concerned, we conclude that these records do not provide a "colorable basis for concluding that [Petitioner's] claim[s] . . . ha[d] merit." *Leach*, 227 N.C. App. at 411, 742 S.E.2d at 616.

¶ 65 In sum, the application did not show how Petitioner's medical conditions put him at an elevated risk for serious illness or other complications from COVID-19. The absence of an evidentiary link between the general information in the application and the specific facts of Petitioner's case was fatal to Petitioner's ability to make a threshold showing that there was a material issue of fact as to whether an "act, omission, or event" had occurred entitling him to discharge. No hearing under § 17-32 was therefore required. Accordingly, we affirm the trial court's summary denial of the petition.

VI. Conclusion

¶ 66 We affirm the order of the trial court because the application for habeas corpus did not demonstrate that Petitioner had colorable claims for violations of his rights to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution and cruel or unusual punishment under Article 1, § 27 of the North Carolina Constitution.

AFFIRMED.

Judges COLLINS and GORE concur.

STATE OF NORTH CAROLINA
v.
ROBERT STEVENSON DOISEY, DEFENDANT

No. COA20-332

Filed 4 May 2021

Constitutional Law—right to counsel—re-sentencing hearing—waiver—statutory inquiry

At defendant's re-sentencing hearing following his motion for appropriate relief (MAR), the trial court erred by accepting defendant's written waiver of counsel without first conducting the necessary inquiry, pursuant to N.C.G.S. § 15A-1242, to ensure defendant's waiver was valid. Defendant was not required to demonstrate prejudice because he was entitled to be represented by counsel at re-sentencing. The State failed to preserve for appellate review the question of whether defendant's MAR was properly granted, where the State did not oppose the MAR or raise its arguments before the trial court and did not cross-appeal the trial court's ruling on the MAR.

Appeal by Defendant from judgment entered 7 January 2020 by Judge Josephine K. Davis in Halifax County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Sean P. Vitrano for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Robert Stevenson Doisey appeals from a judgment entered upon resentencing for two counts of first-degree statutory sex offense. Defendant argues that he is entitled to a new sentencing hearing because the trial court failed to ensure that Defendant validly waived his right to counsel prior to the resentencing hearing. After careful review, we vacate the trial court's judgment and remand for resentencing.

I. Factual and Procedural Background

¶ 2 In April 1997, Defendant was convicted of two counts of first-degree statutory sex offense and sentenced as a prior record level IV to 339-416 months in prison. On 9 December 2019, Defendant filed a *pro se* Motion

for Appropriate Relief ("MAR") with the trial court, arguing that he was improperly sentenced as a prior record level IV and that he should have been sentenced as a prior record level III.

¶ 3 This matter was heard on 7 January 2020 in Halifax County Superior Court. Prior to the hearing, the following colloquy occurred between the trial judge and Defendant:

> THE COURT: Good morning, Mr. Doisey. We are here in file number 96-CRS-328 through 331. I have had an opportunity to review your Motion for Appropriate Relief regarding resentencing. Before we begin, I wanted to know if you want to continue to represent yourself in this matter, or were you asking for assistance from counsel?
>
> THE DEFENDANT: I will represent myself.
>
> THE COURT: Yes, sir. And I am not sure if you have previously signed any documentation indicating that you were representing yourself in this matter.
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: If I could just get you just to sign a waiver indicating that you were apprised of your right to have counsel assist you in this matter, or represent you in this matter, and that you are indicating that you would like to represent yourself.
>
> (Pause while [D]efendant signed document)
>
> . . . .

The trial court then proceeded with the hearing.

¶ 4 During the hearing, the State conceded that Defendant's prior conviction for misdemeanor escape was misclassified as a felony when Defendant was originally sentenced. Accordingly, Defendant should have been sentenced as a prior record level III instead of IV. The trial court then entered a judgment resentencing Defendant as a prior record level III to a term of 336-413 months' imprisonment. Defendant provided written notice of appeal.

II. Analysis

¶ 5 Defendant argues that he is entitled to a new sentencing hearing because the trial court failed to ensure that he validly waived his right to counsel prior to the resentencing hearing. We agree.

¶ 6 "The right to counsel at all critical stages in criminal proceedings is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution." *State v. Boyd*, 205 N.C. App. 450, 453, 697 S.E.2d 392, 394 (2010) (citing *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977)). "It is well-established that sentencing is a critical stage of a criminal proceeding to which the right to . . . counsel applies." *State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014) (citation and internal quotation marks omitted). "Accordingly, [t]his Court has held that the threat of imprisonment at a resentencing hearing triggers an absolute right to counsel under the Sixth Amendment and N.C. Gen. Stat. § 7A-451." *Id.*; *see also Boyd*, 205 N.C. App. at 454, 697 S.E.2d at 394 ("[A]n indigent defendant is entitled to be represented at a resentencing proceeding at which he or she is at risk of being sentenced to imprisonment." (citation omitted)).

¶ 7 Once the constitutional right to counsel is triggered, a defendant may waive his right to counsel and elect to represent himself only after the trial court ensures that the defendant's waiver is valid pursuant to N.C. Gen. Stat. § 15A-1242, which provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2019). "The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*[,]" and "[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted).

¶ 8 N.C. Gen. Stat. § 15A-1242 and our caselaw construing its requirements clearly demand more than the surface inquiry conducted by the trial court in this case. *See Boyd*, 205 N.C. App. at 453-54, 697 S.E.2d at 394-95. For example, in *Boyd*, this Court held that the following collo-

quy between the trial court and a defendant during a resentencing hearing did not amount to a valid waiver:

> THE COURT: Mr. Boyd, do you wish to be represented by counsel at the resentencing?
>
> [DEFENDANT]: No.
>
> THE COURT: Mr. Barnes, I am going to appoint you as standby counsel based on the defendant's election to represent himself. Sheriff, would you ask him to sign a waiver indicating that he is going to be representing himself.
>
> [DEFENDANT]: I ain't signing nothing.
>
> THE COURT: Let the record reflect that the defendant has been offered an opportunity to execute a waiver of his rights after he announced to the Court that he wishes to represent himself.

Id.

¶ 9 As in *Boyd*, the trial court in this case asked Defendant, "I wanted to know if you want to continue to represent yourself in this matter, or were you asking for assistance from counsel?" Defendant replied that he wished to proceed *pro se*, and the trial court requested that Defendant sign a form waiving his right to counsel. The trial court conducted no further inquiry before proceeding with the hearing. Absent a more searching inquiry, we conclude that the colloquy between Defendant and the trial court did not comply with the requirements of a valid waiver under N.C. Gen. Stat. § 15A-1242.

¶ 10 The State's primary argument on appeal is that the trial court erred by granting Defendant's MAR because the MAR was procedurally barred based upon his prior appeal and several prior MARs. In fact, the State "concedes the trial court erred by granting Defendant's MAR. The trial court did not err however by awarding Defendant the remedy he sought."

¶ 11 We cannot consider the State's argument for two reasons. First, the State did not cross-appeal the trial court's ruling granting the MAR by filing a petition for review by certiorari pursuant to N.C. Gen. Stat. § 15A-1422(c)(3). The State may seek discretionary appellate review of an order granting an MAR but did not do so here. *See State v. Stubbs*, 368 N.C. 40, 43, 770 S.E.2d 74, 76 (2015) ("[G]iven that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court

broad powers 'to supervise and control the proceedings of any of the trial courts of the General Court of Justice,' [N.C. Gen. Stat.] § 7A-32(c) [(2014)], and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court."). Second, the State did not oppose Defendant's MAR before the trial court. The State did not raise any argument before the trial court regarding a procedural bar and instead agreed Defendant should be resentenced. Because the State did not raise its arguments before the trial court and did not advise the trial court of Defendant's prior MAR proceedings, we cannot consider this argument on appeal. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *see also State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991) ("The purpose of [Rule 10(a)(1)] is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." (citations omitted)).

¶ 12 Lastly, although the State also concedes that Defendant "had a statutory right to counsel at the hearing on his MAR[,]" it argues that Defendant did not have "a constitutional right to counsel at a postconviction hearing on his MAR." The State contends that because Defendant only had a statutory right to counsel, Defendant must show prejudice resulting from the trial court's failure to ensure that Defendant validly waived his right to counsel during the post-MAR resentencing hearing. *See* N.C. Gen. Stat. § 15A-1443(a) (2019) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.").

¶ 13 We find this argument uncompelling. As previously discussed, "the threat of imprisonment at a resentencing hearing triggers an absolute right to counsel under the Sixth Amendment and N.C. Gen. Stat. § 7A-451." *Rouse*, 234 N.C. App. at 95, 757 S.E.2d at 692 (citation and internal quotation marks omitted). This right is triggered regardless of whether the resentencing hearing is conducted pursuant to an MAR or not. *Id.* Indeed, this Court has previously held that a defendant's constitutional right to counsel attaches at a resentencing hearing held pursuant to a granted MAR. *See id.* at 93, 95, 757 S.E.2d at 691-92 (holding

that a criminal defendant had a constitutional right to counsel during a resentencing hearing held pursuant to an MAR where the defendant was improperly sentenced as a prior record level III instead of a prior record level II).

¶ 14 Because a constitutional right to counsel attaches at a resentencing proceeding, Defendant is not required to show prejudice resulting from the trial court's failure to ensure that he validly waived his right to counsel. *Boyd*, 205 N.C. App. at 452-54, 697 S.E.2d at 393-94. In *Boyd*, for example, the defendant was serving a term of 21-26 months' imprisonment at the time of the resentencing hearing. *Id.* at 452-53, 697 S.E.2d at 393-94. After the hearing, the trial court verified the defendant's prior record level but left the defendant's original prison sentence intact. *Id.* at 453, 697 S.E.2d at 394. Nonetheless, this Court vacated the trial court's judgment and remanded the case for resentencing, holding that the trial judge did not ensure that the defendant validly waived his right to counsel prior to the resentencing proceeding as required by the Sixth Amendment of the U.S. Constitution and N.C. Gen. Stat. § 15A-1242. *Id.* at 453-54, 456, 697 S.E.2d at 394-96.

¶ 15 Here, Defendant was similarly serving a prison sentence at the time of the resentencing proceeding. After concluding that Defendant was improperly sentenced as a prior record level IV instead of III, the trial court reduced Defendant's original sentence by three months. As in *Boyd*, we conclude that Defendant's Sixth Amendment right to counsel attached at the resentencing hearing. Accordingly, Defendant need not show prejudice resulting from the trial court's failure to ensure that he validly waived his right to counsel pursuant to N.C. Gen. Stat. § 15A-1242.

III. Conclusion

¶ 16 For the reasons stated herein, we conclude that the trial court failed to ensure that Defendant validly waived his right to counsel as required by N.C. Gen. Stat. § 15A-1242. Accordingly, we vacate the trial court's judgment and remand for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Chief Judge STROUD and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
RONALD KEITH EZZELL

No. COA20-50

Filed 4 May 2021

1. Evidence—Rules of Evidence—applicability—suppression hearing—testimony on HGN testing—impaired driving case

At a hearing on defendant's motion to suppress evidence from his arrest for driving while impaired, the trial court was not required to determine whether the arresting officer was qualified under Rule of Evidence 702 to testify as an expert on Horizontal Gaze Nystagmus (HGN) testing because, taken together, Rules 104(a) and 1101(b)(1) provide that the Rules of Evidence do not apply in suppression hearings. Moreover, the court did not abuse its discretion by considering the officer's testimony where the officer had extensive training and experience in conducting the HGN test, where HGN test results are considered sufficiently reliable evidence of impairment, and where the officer's testimony was relevant to whether there was probable cause to arrest defendant for impaired driving.

2. Motor Vehicles—driving while impaired—warrantless arrest—probable cause—HGN testing—findings of fact

The trial court properly denied defendant's motion to suppress evidence from his warrantless arrest where competent evidence supported the court's factual findings, which in turn supported the conclusion that the officer had probable cause to arrest defendant for driving while impaired. Defendant was driving when the officer stopped him, the officer smelled a strong odor of alcohol on defendant's breath and person, and—after denying any alcohol consumption—defendant submitted to two breathalyzer tests and a Horizontal Gaze Nystagmus (HGN) test, all of which returned positive results for alcohol impairment. Notably, the court's findings regarding the HGN test were supported by the officer's testimony that he had extensive training and experience in conducting HGN tests, considered it an accurate tool for detecting impairment, and administered the test to defendant consistent with his training.

Appeal by Defendant from judgment entered by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Ricci, for the State-Appellee.

Anne Bleyman for the Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Ronald Keith Ezzell appeals from judgment entered upon a jury verdict of guilty of driving while impaired. Defendant argues that his conviction must be vacated because the trial court erred by denying his motions to suppress his arrest and evidence gained as a result of his arrest. Defendant contends that his warrantless arrest was not supported by probable cause and that the trial court was required to apply the rules of evidence to testimony given during the hearing on Defendant's motions to suppress. We discern no error.

I. Factual Background and Procedural History

¶ 2 On 28 December 2009, Trooper Brian Theis of the North Carolina State Highway Patrol cited Defendant for driving while impaired, displaying an expired registration plate, driving while license revoked, and driving with an open container. On 12 October 2010, the district court found Defendant guilty of all charges; on that date Defendant appealed to superior court for a trial de novo.

¶ 3 Prior to trial in superior court, the driving while license revoked and driving with an open container charges were dismissed. On 18 July 2016, Defendant filed pretrial motions to suppress his arrest, any evidence gained as a result of his arrest, and any testimony by Theis concerning the administration of and interpretation of the Horizontal Gaze Nystagmus ("HGN") test. The trial court heard Defendant's motions and entered an order denying them that same day. In the order, the trial court made the following findings of fact:

> 1. On December 28, 2009 at about 4:00 pm, Brian Theis, a then nine year veteran with the North Carolina Highway Patrol, was on duty and traveling East on Highway 74 (a public street or highway) in Cleveland County in his patrol car. He noticed a motor vehicle traveling in the same direction in front of him with an expired license plate. As a result he stopped the motor vehicle. Upon approaching the driver's side of the vehicle, the Trooper found the defendant as the driver of the motor vehicle seated in the driver's

seat. The Trooper requested the driver's license and vehicle registration from the defendant. In talking to the defendant the Trooper then noted a strong odor of alcohol coming from the defendant's breath and person. Upon noting the smell the Trooper asked the defendant if he had consumed alcohol to which the defendant deceptively denied any such consumption. The Trooper then requested the defendant to submit to an alcosensor screening test. The defendant submitted to the test and provided two breath samples approximately five minutes apart. The alcosensor gave positive readings on each test for the presence of alcohol and the difference between the two results was not greater than .02. The Trooper then requested the defendant to exit his vehicle to which the defendant complied. The alcosensor used by the Trooper was in proper working order and properly calibrated at the time.

2. Trooper Brian Theis began Highway Patrol School on July 29, 2000. While in this training he received instruction in field sobriety investigations which included training in the administration of the horizontal gaze and nystagmus test (HGN) for the detection of impairment and the interpretation of the results from the test. During this training Brian Theis participated in controlled alcohol consumption testing of individuals before and after their consumption of alcohol, including performance by him on them of the HGN test. At the time he was being trained and supervised by other individuals trained and experienced in the administration and interpretation of the results of HGN testing. Subsequent to Highway Patrol School, Trooper Theis spent several months in the field with an experienced Trooper for further training which included investigations of driving while impaired cases and the performance of various field sobriety tests including the HGN test. Trooper Theis also has received annual refresher training on field sobriety testing including HGN testing. During Trooper Theis' career as a Trooper with the North Carolina Highway Patrol beginning in 2000 he has conducted approximately 400 driving while impaired investigations and

administered 100 to 150 HGN tests. In 2011 Trooper Theis successfully completed the ARIDE training which included training in the administration and interpretation of HGN testing.

3. HGN testing is an accepted test for the determination of impairment and is specifically referenced and, with certain qualifications, approved as evidence by the Legislature in Rule 702 of the Rules of Evidence. The premise of the testing is the detection of noticeable involuntary nystagmus or jerking of the eyes at certain points in the movement of eyes which is an indicator of impairment. The test requires an individual suspected of impairment to follow with their eyes a stimulus being moved approximately 12 inches in front of their face. The stimulus is initially moved from left to right and followed by the eyes of the individual being tested without the individual moving their head. First the officer is looking to see that the eyes move together with equal tracking of the stimulus. If so the officer then proceeds with the remaining portions of the test. Second the officer is looking for smooth pursuit by the eyes of the stimulus. Nonsmooth pursuit or jerking of the eyes as they move with the stimulus is an indication of impairment and is observed as to each eye. Third the officer checks for distinct and sustained nystagmus when the individual's eyes are at maximum deviation. As the stimulus is held far to the left and then to the right, each eye is observed for the distinct and sustained nystagmus which if present is an indication of impairment. Fourth the officer moves the stimulus from center to a 45 degree angle with each eye. The onset of nystagmus prior to reaching the 45 degree angle is an indication of impairment. Thus there are three clues for impairment as to each eye or six in total. HGN testing has been found to be sufficiently reliable to be admissible in the trial of driving while impaired in other appellate cases to which this Court takes judicial notice.

4. Trooper Theis performed the HGN test on the defendant with the cooperation and consent of

> the defendant and the testing was performed consistent with the appropriate methods of testing and experience of the Trooper. The HGN test was performed on the defendant while the defendant was seated in the patrol car, however, there is no indication that HGN testing could not be performed in such a manner nor that it would affect its reliability. The HGN testing of the defendant revealed all six indications of impairment. The Trooper has also found the HGN testing to be reliable in the detection of impairment in other driving while impaired investigations conducted by him.
>
> 5. Also prior to arrest the defendant referred to the Trooper as [ma'am] on several occasions and he had a stuttered speech. Based on the Trooper's observations and extensive experience he formed an opinion that the defendant had consumed a sufficient quantity of an impairing substance so as to appreciably impair the mental and physical faculties of the defendant and placed the defendant under arrest for driving while impaired. There were no other indications of impairment prior to defendant's arrest, however, no other field tests were performed as a result of the danger that would be posed by the high traffic area.

¶ 4 Based on these findings of fact, the trial court made the following conclusions of law:

> [T]he Trooper had reasonable and articulable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that the defendant was guilty of the offense of driving while impaired and thereby he had probable cause to arrest the defendant for driving while impaired. As a result the defendant's Constitutional and statutory rights were not violated and the motion[s] to suppress should be denied.
>
> Defendant also contends that the testimony in regard to the HGN testing by the Trooper is inadmissible referring to Rule 702 of the Rules of Evidence. However, Rule 1101 of the Rules of Evidence provides that the Rules of Evidence are inapplicable to probable

> cause hearings. Therefore, Rule 702 is not applicable for determining admissibility for the consideration of probable cause, and such evidentiary determination should be left to the trial judge. While the Court allowed the [Trooper] to testify as an expert qualified in the field of the administration of HGN testing and the interpretation of the results for the detection of impairment, such labeling is somewhat meaningless for the determination of probable cause in light of the inapplicability of the Rules of Evidence to this proceeding. The Court in a probable cause hearing is required to look at the totality of the circumstances for the determination of probable cause. Assuming arguendo, however, that the requirements of Rule 702 are applicable from a Constitutional or statutory standpoint, the Court concludes for the purpose of the determination of probable cause that Trooper Theis had sufficient knowledge, skill, experience, training, and education to testify as such an expert and that this scientific and specialized knowledge assisted the Court in understanding the evidence and determining the facts in issue.

¶ 5 The case came on for trial in superior court on 11 June 2019. At trial, the expired registration charge was dismissed at the close of the State's evidence. The trial court overruled Defendant's objections to the evidence flowing from the arrest and Theis' HGN testimony when Defendant renewed them at trial. The jury found Defendant guilty of driving while impaired and the trial court sentenced Defendant to 24 months' imprisonment; 30 days to be served as an active sentence, and the remainder suspended for supervised probation. Defendant gave notice of appeal in open court and subsequently filed a written notice of appeal.

II. Discussion

A. Applicability of the Rules of Evidence

¶ 6 **[1]** We first address whether the rules of evidence applied during the hearing on Defendant's motions to suppress. Defendant contends that the rules of evidence did apply to the suppression hearing, and that the trial court erred in permitting Theis to testify as an expert witness on HGN because he was not qualified to do so under Rule 702.

¶ 7 "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2021). We review questions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

¶ 8 The rules of evidence "apply to all actions and proceedings in the courts of this State" unless otherwise provided. N.C. Gen. Stat. § 8C-1, Rule 1101(a) (2016). In turn, Rule 104(a) provides that

> [p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of [Rule 104(b)]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

N.C. Gen. Stat. § 8C-1, Rule 104(a) (2016). Rule 1101(b) identifies specific "situations" in which "[t]he rules other than those with respect to privileges do not apply . . . ." N.C. Gen. Stat. § 8C-1, Rule 1101(b) (2016). These include "the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)." N.C. Gen. Stat. § 8C-1, Rule 1101(b)(1).

¶ 9 Motions to suppress necessarily present preliminary questions concerning the admissibility of evidence: whether there is both a factual and legal basis to exclude the evidence at issue.[1] *See* N.C. Gen. Stat. §§ 15A-974, -978 (2016) (detailing grounds on which a motion to suppress evidence may be granted). Rules 104(a) and 1101(b)(1) therefore "state explicitly the rules of evidence do not apply in suppression hearings." *State v. Ingram*, 242 N.C. App. 173, 182, 774 S.E.2d 433, 440 (2015). Rules 104(a) and 1101(b)(1) contemplate that when faced with preliminary questions where the rules of evidence do not apply, "the trial court will consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence." *In re Will of Leonard*, 82 N.C. App. 646,

1. Courts in other jurisdictions have classified motions to suppress in this way. *See Matoumba v. State*, 890 A.2d 288, 293 (Md. 2006) ("[S]uppression hearings involve the determination of preliminary questions concerning the admissibility of evidence . . . ."); *Granados v. State*, 85 S.W.3d 217, 227 (Tex. Crim. App. 2002) (same); *State v. Wright*, 843 P.2d 436, 439 (Ore. 1992) ("[A] hearing on a motion to suppress evidence involves a preliminary question of fact concerning the admissibility of evidence . . . ."); *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982) ("The purpose of the suppression hearing was, of course, to determine preliminarily the admissibility of certain evidence . . . .").

648, 347 S.E.2d 478, 480 (1986). The "trial court ha[s] 'great discretion to admit any evidence relevant to' the suppression hearing." *Ingram*, 242 N.C. App. at 183, 774 S.E.2d at 441 (quoting *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513 (1999)). The trial court is responsible for determining the weight to be accorded to the evidence, *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993), and in doing so may be guided by the principles underlying the rules of evidence, *cf. State v. Nobles*, 357 N.C. 433, 439, 584 S.E.2d 765, 771 (2003) ("The Rules of Evidence do not apply at capital sentencing proceedings; however they are instructive and 'may be helpful as a guide to reliability and relevance' in capital sentencing." (citation omitted)).

¶ 10 In *Ingram*, defendant moved to suppress certain evidence on the grounds that his medical condition rendered his waiver of *Miranda* rights and subsequent statements he gave to police involuntary. *Ingram*, 242 N.C. App. at 174-75, 774 S.E.2d at 436-37. At the suppression hearing, defendant called a forensic pathologist who had reviewed his medical records. *Id.* at 177, 774 S.E.2d at 437-38. When the pathologist sought to testify as to the contents of a nurses' note, the trial court overruled the State's hearsay objection. *Id.* at 177, 774 S.E.2d at 438. Following the hearing, the trial court suppressed certain statements made by defendant and the State appealed. *Id.* at 179, 774 S.E.2d at 439.

¶ 11 On appeal, the State argued that the trial court erred by admitting and considering the nurses' note because it was hearsay. *Id.* at 182, 774 S.E.2d at 440. Rejecting the State's argument, the Court "note[d] that Rules 104(a) and 1101(b)(1) of the North Carolina Evidence Code state explicitly the rules of evidence do not apply in suppression hearings." *Id.* The Court broadly stated that "[a]s the proceeding was a suppression hearing, the trial court was not bound by the formal rules of evidence and acted within its discretion when it admitted the hearsay evidence." *Id.* at 183, 774 S.E.2d at 441 (quotations, brackets, and citations omitted).[2]

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2. *Ingram* is in accord with cases from other states holding that, pursuant to rules analogous to North Carolina's Rules 104 and 1101, the rules of evidence are inapplicable to suppression hearings. *See State v. Martinez*, 886 N.W.2d 256, 262 (Neb. 2016) ("[I]n a criminal case, the rules of evidence do not apply at suppression hearings."); *State v. Shirley*, 10 So. 3d 224, 228 (La. 2009) (Evidence Code "may be read to generally exempt hearings on motions to suppress evidence from the rules of evidence except with respect to privileges"); *State v. Boczar*, 863 N.E.2d 155, 159 (Ohio 2007) ("[T]he Rules of Evidence do not apply to suppression hearings."); *State v. Woinarowicz*, 720 N.W.2d 635, 642 (N.D. 2006) ("A district court is not bound by the rules of evidence in suppression hearings."); *State v. Jiles*, 663 N.W.2d 798, 807 (Wis. 2003) ("The defendant cannot prevail on an argument that the court *must* apply the rules of evidence at a suppression hearing."); *Granados*, 85 S.W.3d at 227 ("Because suppression hearings involve the determination of preliminary questions concerning the admissibility of evidence, the language of the current rules indicates that

¶ 12 Defendant's argument that the trial court was required to apply the rules of evidence and erroneously permitted Theis' testimony under those rules is therefore without merit.

¶ 13 During the suppression hearing in this case, Theis testified that he was trained in conducting the HGN test, had practiced it in multiple settings, and had administered it to Defendant consistent with his training. Theis testified that in his experience, HGN was accurate and a "very good tool to use for detection of impaired drivers." Moreover, "our General Assembly [has] clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." *State v. Godwin*, 369 N.C. 604, 613, 800 S.E.2d 47, 53 (2017) (citing N.C. Gen. Stat. § 8C-1, Rule 702(a1)). Theis' testimony concerning the HGN test was relevant to the question of whether Theis had probable cause to arrest Defendant for driving while impaired. Accordingly, the trial court did not abuse its discretion by considering the evidence during the suppression hearing.[3]

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the rules of evidence (except privileges) no longer apply to suppression hearings."); *State v. Cluley*, 808 A.2d 1098, 1106 (R.I. 2002) ("In any event, the rules of evidence do not apply at suppression hearings."); *State v. Towne*, 615 A.2d 484, 493 n.1 (Vt. 1992) ("[T]he rules of evidence do not apply to preliminary suppression hearings."); *Wright*, 843 P.2d at 438 (holding that rules of evidence do not apply to suppression hearings).

Likewise, federal circuit courts of appeal have concluded that the Federal Rules of Evidence are inapplicable to suppression hearings. *See United States v. Harmon*, 742 F.3d 451, 460 n.6 (10th Cir. 2014) ("We recognize that the Federal Rules of Evidence do not apply to suppression hearings."); *United States v. Stepp*, 680 F.3d 651, 668 (6th Cir. 2012) ("The Rules of Evidence are inapplicable . . . to the admission of evidence presented at suppression hearings."); *United States v. Ozuna*, 561 F.3d 728, 736 (7th Cir. 2009) (agreeing that the Federal Rules of Evidence did not apply at "pre-trial admissibility hearings" such as a suppression hearing); *United States v. Henderson*, 471 F.3d 935, 937-38 (8th Cir. 2006) (holding that the rules of evidence do not apply at suppression hearings and "[a]dmission of evidence at a suppression hearing is reviewed for abuse of discretion"); *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003) (overruling objection to district court's consideration of an affidavit in a suppression hearing because the rules of evidence did not apply); *United States v. Bunnell*, 280 F.3d 46, 49 (1st Cir. 2002) ("The Federal Rules of Evidence, apart from testimonial privileges, do not apply at suppression hearings."); *United States v. Dickerson*, 166 F.3d 667, 679 n.2 (4th Cir. 1999) ("We do not mean to imply that the Federal Rules of Evidence are binding at a suppression hearing; they are not."), *rev'd on other grounds*, 530 U.S. 428 (2000); *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994) ("The Rules of evidence do not generally apply to suppression hearings."); *United States v. Lee*, 541 F.2d 1145, 1146 (5th Cir. 1976) ("Rule 104(a) leaves no doubt that hearsay evidence is admissible in a suppression hearing to determine probable cause.").

While not binding on this Court, these cases provide particularly persuasive authority for our interpretation of North Carolina Rules 104 and 1101. *See State v. Collins*, 216 N.C. App. 249, 256, 716 S.E.2d 255, 260 (2011) (considering authority from federal courts where the relevant rules of evidence were in parallel).

3. Because we hold that the Rules of Evidence did not apply at the suppression hearing, we do not reach Defendant's challenges to the trial court's conclusions of law that if

B. Competent Evidence Supports the Trial Court's Findings of Fact

¶ 14 **[2]** Defendant argues that portions of Findings 1, 4, and 5 were not supported by competent evidence. "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Id.* at 168, 712 S.E.2d at 878.

¶ 15 Defendant contends that there was no support for the finding that Theis "noted a strong odor of alcohol" on Defendant's breath and person. At the suppression hearing, Theis testified that his opinion on Defendant's impairment was based on his "training and experience, the strong odor, the HGN testing, and the Alco-Sensor reading." Theis also prepared an "Affidavit and Revocation Report" which noted a "strong odor of alcoholic beverage on [Defendant's] breath . . . ." The finding concerning a strong odor of alcohol is therefore supported by competent evidence.

¶ 16 Defendant also argues that there was no support for the finding that Defendant "deceptively denied" any alcohol consumption. Theis recalled that during the stop, he "asked [Defendant] if he had had anything to drink," and he "remember[ed] [Defendant] saying he had not drank anything." As discussed above, Theis testified to detecting a strong odor of alcohol on Defendant's breath and person. Additionally, Theis testified that two Alco-Sensor tests on Defendant returned positive results. The trial court could infer from this evidence that Defendant had in fact been drinking an alcoholic beverage, despite his denial, and had therefore "deceptively denied" Theis's question. *See Balawejder v. Balawejder*, 216 N.C. App. 301, 318, 721 S.E.2d 679, 689 (2011) ("It is well-settled that when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (quotation marks and citation omitted)).

¶ 17 Defendant next challenges the finding that "[t]he alcosensor used by the Trooper was in proper working order and properly calibrated at the time." Defendant contends that this finding is unsupported because Theis testified that he "had no documentation the device had been prop-

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those rules applied, Theis was qualified to testify as an expert and that Theis's "testimony was based upon sufficient facts and data, and was the product of reliable principles and methods, and that he applied the principles and methods reliably to the facts of this case for admissibility in this hearing."

erly calibrated, although such documentation was required by highway patrol policy." Nonetheless, Theis testified that he alone was assigned the sensor, he was responsible for calibrating it, his Highway Patrol district required calibration twice a month, and the sensor was indeed properly calibrated pursuant to this policy. Defendant also challenges the trial court's findings concerning the Alco-Sensor on the grounds there was no competent evidence that the device had been approved as required by N.C. Gen. Stat. § 20-16.3(c) (2016). Theis testified, however, that the device was approved for use by the Department of Health and Human Services, as required by section 20-16.3(c). The trial court's findings concerning the Alco-Sensor were therefore supported by competent evidence.

¶ 18 Defendant contends that the finding that Theis "formed an opinion that the defendant had consumed a sufficient quantity of an impairing substance so as to appreciably impair the mental and physical faculties of the defendant" is not supported by competent evidence. Defendant argues that Theis testified only that Defendant was "impaired," not "appreciably impaired."

¶ 19 The following colloquy occurred during direct examination of Theis:

> Q: And did you feel that prior to arrest you observed him for a sufficient amount of time to form an opinion satisfactory to yourself as to whether [Defendant] had consumed a sufficient quantity of some impairing substance that would appreciably impaired [sic] his mental or physical faculties or both?
>
> A: Yes.
>
> Q: And what was your opinion?
>
> A: I believed that [Defendant] had consumed a sufficient amount of impairing substance to impair his physical or—physical or mental faculties or both.
>
> Q: And what did you base your opinion on?
>
> A: I based it off my training and experience, the strong odor, the HGN testing, and the Alco-Sensor reading.

In context it is apparent that Theis acknowledged that "[Defendant] had consumed a sufficient quantity of some impairing substance that would appreciably impaired [sic] his mental or physical faculties or both" and that Theis's omission of "appreciably" in his subsequent answer was a

mere slip of the tongue. The trial court's finding concerning Theis's opinion was supported by competent evidence.

¶ 20 Defendant also challenges the finding that "no other field tests were performed as a result of the danger that would be posed by the high traffic area." Theis never testified that he performed no other tests on Defendant beyond the HGN. Instead, he testified that he could not remember whether he performed other tests, and that it was possible that he had. This finding is not supported by competent evidence.

¶ 21 Finally, Defendant broadly challenges the trial court's findings concerning the administration of and results from the HGN test. Theis testified that he was trained in conducting the HGN test on multiple occasions, had practiced administering it, Defendant agreed to take the HGN test, and he administered the test to Defendant consistent with his training. Theis indicated that upon administering the test to Defendant, he found all six clues of impairment. Theis testified that he believed Defendant took the HGN test while seated in the front passenger seat of the patrol car. On cross examination, Theis testified that he had not received training about conducting the HGN test while the subject is seated, but no evidence that the test could not be reliably conducted in this manner was elicited. Theis testified that his training "proved to [him] that [HGN] was a very good tool to use for detection of impaired drivers" and that he found the test to be accurate. Accordingly, the trial court's findings concerning the HGN test are supported by competent evidence.

C. The Trial Court's Findings of Fact Support its Conclusions of Law

¶ 22 Defendant argues that the trial court's findings of fact do not support the conclusion of law that Theis had probable cause to arrest Defendant for driving while impaired and that, as a result, Defendant's rights were not violated.

¶ 23 "To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). "Whether probable cause exists depends upon 'whether at that moment the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.' " *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

¶ 24 "A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance."

N.C. Gen. Stat. § 20-138.1(a)(1) (2009). A person is considered "under the influence of an impairing substance" where the person's "physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2009).

¶ 25 "[A]s this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired." *State v. Townsend*, 236 N.C. App. 456, 465, 762 S.E.2d 898, 905 (2014) (citing *State v. Rogers*, 124 N.C. App. 364, 477 S.E.2d 221 (1996)). In *Rogers*, for example, the defendant stopped his car to ask for directions from a trooper directing traffic in an intersection. 124 N.C. App. at 366, 477 S.E.2d at 222. When the trooper approached, he noticed that the defendant was the sole occupant of the car and detected a strong odor of alcohol on the defendant's breath. *Id.* The trooper requested that the defendant pull over and administered an Alco-Sensor test, which returned a positive result. *Id.* at 369, 477 S.E.2d at 224. We held that these circumstances gave rise to probable cause to arrest the defendant for driving while impaired. *Id.*

¶ 26 In the present case, the trial court found that Theis "noted a strong odor of alcohol coming from [Defendant's] breath and person." Theis conducted two Alco-Sensor tests using a properly calibrated device, and both samples were positive for the presence of alcohol. *See* N.C. Gen. Stat. § 20-16.3(d)(1) (deeming positive results on an alcohol screening test admissible to determine whether probable cause existed for implied-consent offenses such as driving while impaired). Theis also performed the HGN test on Defendant "consistent with the appropriate methods of testing and [Theis's] experience[,]" and the testing revealed all six relevant indications of impairment.

¶ 27 Together, these findings of fact support the trial court's conclusion of law that Theis had "reasonable and articulable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that [Defendant] was guilty of the offense of driving while impaired and thereby . . . had probable cause to arrest [Defendant] for driving while impaired." The trial court did not err by denying Defendant's motion to suppress.

III. Conclusion

¶ 28 The trial court did not err in concluding that the rules of evidence did not apply to the suppression hearing. Competent evidence supported the trial court's findings of fact, and the trial court's findings of fact support the conclusion of law that there was probable cause to arrest

Defendant for driving while impaired. The trial court did not err by denying Defendant's motions to suppress.

NO ERROR.

Judges GORE and JACKSON concur.

STATE OF NORTH CAROLINA
v.
SCOTT WARREN FLOW

No. COA20-534

Filed 4 May 2021

1. Constitutional Law—right to be present at trial—waiver—voluntary absence—sua sponte competency hearing—unneccesary

In a prosecution for rape, sexual offense, and other charges arising from a home burglary, the trial court properly denied defense counsel's motion for a competency hearing where defendant missed trial after injuring himself by jumping sixteen feet from the jailhouse's second-floor mezzanine. The court heard testimony and conducted the appropriate fact-intensive inquiry at a hearing to determine that defendant voluntarily absented himself from trial, and a further inquiry into defendant's capacity was unnecessary where neither the evidence presented to the court nor defendant's medical history or conduct indicated that he might have been mentally incompetent.

2. Sexual Offenses—first-degree sexual offense—jury instruction—sexual act—multiple acts—verdict need not specify which act

The trial court's jury instruction on first-degree forcible sexual offense did not deprive defendant of his right to a unanimous jury verdict, where the court instructed the jury to find defendant guilty if it found defendant had engaged in fellatio or anal intercourse with the victim. Because multiple acts can satisfy the "sexual act" element of first-degree sexual offense, the jury was not required to make a specific finding regarding which sexual act (or acts) defendant committed and, therefore, it did not matter that individual jurors may have reached different conclusions on that particular issue.

STATE v. FLOW

[277 N.C. App. 289, 2021-NCCOA-183]

Appeal by defendant from judgments entered 20 December 2019 by Judge Nathan H. Gwyn, III in Gaston County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

¶ 1 Scott Warren Flow ("Defendant") appeals from judgments entered upon a jury's verdict. We find no error.

I. Background

¶ 2 Defendant met "Hannah" in the spring of 2017, and they began a romantic, but non-sexual, relationship (pseudonym used to protect complainant's identity). Around Thanksgiving of 2017, Defendant and Hannah were waiting inside a vehicle in a parking lot to pick up Hannah's daughter, Brooklin, when she got off of work. While in the car, Defendant became agitated as Hannah was texting her niece.

¶ 3 After Brooklin entered the car, Defendant "sped[] off . . . [was] cussing, and got mad." Brooklin tried to calm Defendant during the drive to Hannah's house. After Defendant pulled the car into the carport, he began "cussing and raging."

¶ 4 Hannah's house was decorated for Christmas. Defendant took Christmas presents from under the tree and threw them across the house. Defendant left the house. Hannah ended their relationship. Defendant was upset and responded Hannah "would regret ever having known him."

¶ 5 On Christmas Day 2017, Hannah, Brooklin, and Brooklin's boyfriend discovered both of Hannah's car tires on the right side were flat. Hannah was alarmed and sought and received a Domestic Violence Protective Order ("DVPO") against Defendant in February 2018 under N.C. Gen. Stat. § 50B-1(b)(6) (2019).

¶ 6 Hannah's mother was hospitalized after Christmas 2017 with double pneumonia. Hannah was visiting her mother at the hospital. Defendant came into Hannah's mother's room at the hospital. Hannah tried to avoid him by leaving the room. Defendant sought to speak with Hannah in the waiting room of the hospital. Hannah told Defendant she could not speak

with him because of the DVPO. Defendant apologized to Hannah for his actions. Defendant and Hannah then spoke for about twenty minutes.

¶ 7 Hannah and Defendant began communication via text messaging and telephone. Defendant admitted to and apologized for puncturing Hannah's tires. Hannah and Defendant began seeing each other again in person.

¶ 8 On 26 May 2018, Hannah picked up Brooklin to go shopping. While they were in the car, Defendant called Hannah screaming: "I'm being shot at, I'm being shot at[.]" Hannah called Defendant back. Defendant stated he was with his friend, Johnny Max, at Max's house. Max's father or father-in-law had started shooting at him.

¶ 9 While Hannah and Brooklin were in a store, Defendant called Hannah on Facetime video from the front porch of Hannah's niece, Christine's, house. Defendant said he was hiding from law enforcement officers because of the incident at Max's house. Defendant believed 911 had been called with a description of his car. Hannah asked Defendant to leave Christine's house.

¶ 10 Defendant again called Hannah, reporting he was "going to kill a ni--er." Hannah believed Defendant may harm her older daughter's boyfriend, who was black. Hannah left Brooklin at her house babysitting Hannah's two grandchildren, Armoni and Daeja. Hannah drove to her other daughter's house. Defendant was not there.

¶ 11 Brooklin and Armoni were in the kitchen around 7:30 p.m. Brooklin heard a car pulling into the driveway. Daeja was in her crib upstairs. Brooklin recognized Defendant and told Armoni to go upstairs. Brooklin locked the door and went to make sure Armoni had hidden herself. Brooklin went to the laundry room to look outside.

¶ 12 Brooklin observed Defendant get out of his car and approach the back door. Defendant banged on the door with his fist, then began kicking the door. Brooklin heard the door crack, saw Defendant walking from the living room, down the hallway, and into Hannah's bedroom. Brooklin called out to Defendant to ask what he was doing. Defendant did not respond. Brooklin could hear Defendant rummaging through Hannah's dressers. Brooklin saw Defendant come out of Hannah's bedroom with her mother's two guns.

¶ 13 Defendant approached Brooklin yelling for her to call her mother. Defendant demanded to know why Hannah was not answering his calls and ignoring him. Brooklin responded she did not know Hannah was ignoring him and Defendant was scaring her. Brooklin was too afraid to

call 911. Brooklin called and texted Hannah but received no response. Brooklin contacted her neighbor, Brittany Brady, who told her to get Armoni and Daeja out of the house.

¶ 14 Around this time, Hannah arrived home. Hannah saw Defendant's car in the driveway, and observed the French doors in the back of the house were open. Brooklin was behind the door. Hannah brushed by Defendant to get Daeja from her crib and then got Armoni. Brady arrived and took Daeja, Armoni, and Brooklin from the house.

¶ 15 Once Brooklin and her grandchildren were gone, Defendant began to drag Hannah upstairs toward her bedroom. Once both were inside the bedroom, Defendant pushed Hannah onto the floor, commanding, "Bitch, get on the floor." After Hannah was on the floor, Defendant walked over and put the gun to the back of her head. He told Hannah she was taking her last breath, because he was going to "blow her brains out."

¶ 16 Defendant grabbed Hannah by her hair, pulled her up to her knees, and shoved her into the bathroom. Defendant entered the bathroom and locked the door. Defendant grabbed Hannah by the neck, placed a gun to her temple, and said, "You used me, didn't you, bitch, you used me." and "You better tell me what I want to hear or I'll blow your brains out." Defendant then put the gun to her eye socket and again threatened to "blow [her] brains out." Hannah begged Defendant for her life.

¶ 17 Defendant had Hannah sit on the floor and not move her hands. Defendant smoked a cigarette and cracked open the bathroom door. Defendant told Hannah "It wasn't supposed to end like this, you were supposed to come to South Carolina, I was gonna kill my daddy and then you and then myself."

¶ 18 Defendant saw police vehicles' blue lights outside. The lights alarmed Defendant, who grabbed Hannah and put his arm around her throat. Defendant told Hannah to call 911, demanding for the police officers to turn off their blue lights, or he was going to "blow her brains out." When Hannah tried to get her hair out of her face, Defendant hit her in the face with the butt of the gun.

¶ 19 Hannah called 911. Defendant told Hannah he was not worried about what was going to happen to him, Gaston County was an "easy" county, and the State of North Carolina does not have "hard rules." Defendant hit Hannah's head against the bathroom sink a couple of times. Defendant hit Hannah in the mouth and told her to "stop her damn crying," he "didn't want to hear that whiny mess."

¶ 20 Defendant made Hannah straddle the toilet and remove his penis from his pants. Defendant urinated on Hannah then made her put his penis back into his pants. Hannah attempted to wipe Defendant's urine off of her. Defendant grabbed Hannah's pants and told her to remove them. Hannah initially refused, but she took off her pants and shirt after Defendant threatened to blow her kneecaps off.

¶ 21 Defendant removed his own pants and positioned himself behind Hannah. Defendant unsuccessfully attempted to insert his penis in Hannah's rectum. Hannah told Defendant he was hurting her and to stop. Defendant attempted but was unable to penetrate Hannah's vagina with his penis. He dragged Hannah out of the bathroom into the bedroom.

¶ 22 Inside the bedroom, Defendant ordered Hannah to get onto her knees. Defendant positioned himself behind Hannah, placed a gun to the back of her head, and inserted his penis into her vagina. Defendant made Hannah turn over onto her back and again inserted his penis into her vagina.

¶ 23 While these events were unfolding, Gaston County police officers were attempting to contact Hannah. Defendant got off Hannah, told her to lie across the bed and to "suck his penis." Defendant grabbed Hannah by her hair, inserted his penis into her mouth, and moved her head up and down. Hannah told Defendant she did not want her children to see her like this and begged to be allowed to put her clothes back on.

¶ 24 Defendant intermittently allowed Hannah to answer her cell phone and speak with police. The officers asked Defendant to release Hannah. When Defendant said he was thirsty, Hannah offered to go get him water. Defendant put his arm around Hannah's neck, put a gun to her temple, and made Hannah walk in front of him as a shield while getting water.

¶ 25 As Defendant and Hannah entered the living room, Defendant became agitated and pulled Hannah backwards into a bathroom. Defendant shut and locked the door. Defendant spoke with police on Hannah's phone. Defendant ordered Hannah to call her pastor and her pastor's wife, but neither answered Hannah's call. Hannah's pastor's wife returned her call, and Defendant told Hannah to talk to her now while she could.

¶ 26 Defendant then grabbed Hannah by her arm and led her back into the bedroom. Defendant locked the bedroom door. Defendant told Hannah to take her clothes off and used his free hand, while holding the gun on her with the other, to pull her clothes off of her. Defendant got on

top of Hannah and again inserted his penis into her vagina. With a gun in his hand, Defendant instructed Hannah to get on top of him and again inserted his penis into her vagina. Defendant instructed Hannah to move, but she was unable to make herself move. Defendant allowed Hannah to get off of him, and he got behind her and re-inserted his penis in her vagina. When Defendant finished, he stood up and allowed Hannah to put her pants and shirt on.

¶ 27 Hannah had her cell phone on speaker with police officers. Defendant used his cell phone to call his uncle, Ronnie Moore, but the call went to voicemail. Defendant was able to reach Moore's daughter, Jennifer, and told her, " I wished you could come get me but I've done something really bad this time, you can't come pick me up." Hannah told police on her phone Defendant was threatening to kill her.

¶ 28 When Defendant's phone went dead, Defendant looked over at Hannah and said, "It's time." Hannah responded, "what do you mean it's time[?]" Defendant said, "I'm gonna kill you and I'm gonna kill myself." Defendant reached up and grabbed Hannah by her neck with his arm, and he pulled her down toward him. Defendant said he was going to blow her brains out. Hannah began to scream and tried to get away. Hannah got to the edge of the bed when she heard a loud noise.

¶ 29 Gaston County police officers had initiated an emergency rescue of Hannah. When the emergency response team reached the back bedroom, they observed Hannah on the floor between Defendant's legs. Defendant had his arm around her neck and was holding a gun to her head. The emergency response team was able to subdue Defendant in handcuffs and grab Hannah, pulling her out of the room to safety. Police recovered two revolvers at the scene.

¶ 30 Hannah was transported to the hospital, where medical professionals took Hannah's medical history and a description of the assault. Hospital staff took photographs of Hannah's injuries; conducted a physical exam; and took swabs of her fingernails, mouth, vaginal, and genital areas. The anal swab, vagina swabs, and genital swabs contained Defendant's DNA profile.

¶ 31 Defendant was indicted for possession of a firearm by a felon, four counts of first-degree kidnapping, burglary, DVPO violation with a deadly weapon, two counts of first-degree rape, and first-degree forcible sex offense. Defendant's charges were joined for trial beginning on 9 December 2019. Defendant was present in court for *voir dire*, opening statements, the testimony of all witnesses, and the closing arguments to the jury from both sides.

¶ 32 The morning of the sixth day of the trial before the jury was to be charged, Defendant was being escorted from the Gaston County Jail. At some point, Defendant indicated he had forgotten his glasses in his cell and asked if he could go and get them. Defendant was standing over the ledge of the second-floor mezzanine. Detention officers reported to the second-floor mezzanine after being told Defendant was "hanging" on the second-floor mezzanine approximately sixteen feet off of the ground. Detention officers told Defendant not to jump, but Defendant jumped feet first. Defendant fell onto a metal table and landed on the ground. Defendant suffered injuries to his left leg and ribs. Defendant was transported to the hospital and underwent surgery to reduce a fracture in his femur.

¶ 33 The trial court conducted a hearing to determine whether Defendant's absence from trial was voluntary. The trial court considered and denied Defendant's counsel's motion for the court to make further inquiry into his capacity to proceed.

¶ 34 The trial court ruled Defendant had voluntarily absented himself from the proceedings, and the trial would continue without Defendant present. The jury charge, jury deliberations, and sentencing commenced without Defendant present in the courtroom. Defendant's counsel objected to each phase proceeding outside of Defendant's presence.

¶ 35 The jury returned verdicts and found Defendant guilty of two counts of first-degree forcible rape, first-degree kidnapping, first-degree forcible sexual offense, second degree burglary, false imprisonment, possession of a firearm by a convicted felon, and DVPO violation with a deadly weapon.

¶ 36 Defendant was sentenced to consecutive sentences of 276 to 392 months for the first-degree forcible sexual offense, and two sentences of 276 to 392 for each first-degree forcible rape. Defendant's convictions for first-degree kidnapping, second degree burglary, DVPO violation with a deadly weapon, possession of a firearm by a felon, and false imprisonment were consolidated for judgment. Defendant was sentenced to 180 to 228 months to run consecutive to his other consecutive sentences. Defendant was ordered to register as a sex offender for the remainder of his natural life. Defendant's counsel gave oral notice of appeal in open court.

II. Jurisdiction

¶ 37 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

¶ 38 Defendant argues the trial court erred by denying Defendant's counsel's motion to conduct an inquiry into his capacity to proceed. Defendant also argues the court's instructions on first-degree sexual offense deprived Defendant of his right to a unanimous jury verdict.

IV. Capacity to Proceed

¶ 39 **[1]** Defendant argues the trial court erred in denying the defense's motion for an inquiry into Defendant's capacity to proceed.

A. Standard of Review

¶ 40 "The standard of review for alleged violations of constitutional rights is de novo." *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012).

B. Necessity of Hearing

¶ 41 Our Supreme Court recently reviewed this issue. When a defendant's capacity to proceed is questioned, the court must determine whether a hearing is necessary. The court must decide "whether there was substantial evidence before the trial court as to [the defendant's] lack of capacity to truly make such a voluntary decision." *State v. Sides*, 376 N.C. 449, 459, 852 S.E.2d 170, 177 (2020). "[T]he decision whether to grant a motion for commitment for psychiatric examination to determine competency to stand trial lies within the sound discretion of the trial judge." *State v. Williams*, 38 N.C. App. 183, 189, 247 S.E.2d 620, 623 (1978). "The method of inquiry [is] within the discretion of the trial judge, the only requirement being that defendant be accorded due process of law." *State v. Gates*, 65 N.C. App. 277, 281, 309 S.E.2d 498, 501 (1983).

¶ 42 Criminal defendants possess the constitutional right to be present at all stages of their trial. *See Kentucky v. Stincer*, 482 U.S. 730, 745, 96 L. Ed. 2d 631, 647 (1987). However, where the offense is non-capital, the Supreme Court has held a defendant may waive that right where they "voluntarily absent" themselves. *See Taylor v. United States*, 414 U.S. 17, 19, 38 L. Ed. 2d 174, 177 (1973).

¶ 43 Our Supreme Court has recognized a "trial court has a constitutional duty to institute, sua sponte (sic), a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977); *see also* N.C. Gen. Stat. § 15A-1002 (2019).

¶ 44 When evaluating whether a *sua sponte* competency hearing is necessary, a trial judge must conduct a fact-intensive inquiry. *Sides*, 376 N.C. at 466, 852 S.E.2d at 181–82. Previously, courts have considered a defendant's answers to the trial court's questions and whether their responses were "lucid and responsive" to demonstrate and support a defendant's competence. *State v. Staten*, 172 N.C. App. 673, 680, 616 S.E.2d 650, 655 (2005). Additionally, "[e]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to an inquiry regarding a defendant's competency. *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000).

¶ 45 In *Sides*, the Supreme Court reviewed a defendant's appeal, who was charged with four counts of felony embezzlement. After the first three days of trial, the defendant intentionally ingested sixty Xanax tablets. *Sides*, 376 N.C. at 450, 852 S.E.2d at 172. A doctor evaluated the defendant and recommended she be involuntarily committed. He checked the box on the petition form describing her as "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." *Id.*

¶ 46 A magistrate found reasonable grounds to believe the defendant required involuntary commitment, and she began a period of commitment. *Id.* at 451, 852 S.E.2d at 172. A psychiatrist evaluated her the next day, and noted the defendant remained suicidal and required inpatient stabilization. *Id.*

¶ 47 Our Supreme Court held the trial court erred by presuming the defendant's suicide attempt was a voluntary waiver of her right to be present at the trial. Pursuant to her attempt, the trial court sought information on whether the absence was voluntary or involuntary. *Id.* at 451, 852 S.E.2d at 173. The trial court recessed the proceedings after reviewing draft orders from the State. *Id.* at 452, 852 S.E.2d at 173.

¶ 48 The trial court intended to wait until the following Monday, when the defendant would be released, or the trial court would have access to her medical records. *Id.* at 452-53, 852 S.E.2d at 173-74. Proceedings resumed on the following Monday, while the defendant remained in the hospital. *Id.* at 453, 852 S.E.2d at 174. The trial court read the defendant's medical records, which included the recommendation from doctors that she remain hospitalized, as well as information about her history of a mood disorder and her prescriptions: Haldol for agitation, Vistaril for anxiety, Trazodone to help her sleep, and 100 milligrams of Zoloft daily. Further, the trial court confirmed with defense counsel that neither

the court nor counsel had observed anything indicating the defendant lacked competency to proceed at trial. *Id.* at 453-54, 852 S.E.2d at 174. The trial court ruled defendant "voluntarily by her own actions made herself absent from the trial" over defense counsel's objection. *Id.* at 454-455, 852 S.E.2d at 174.

¶ 49 The Court held that while a defendant may voluntarily waive the constitutional right to be present at trial, the defendant may only waive the right when they are competent. *Id.* at 456, 852 S.E.2d at 175. The Supreme Court concluded the trial court had erred "by essentially skipping over the issue of competency and simply [pre]summing . . . defendant's suicide attempt was a voluntary act that constituted a waiver of her right to be present during her trial, [and] both the majority at the Court of Appeals and the trial court 'put the cart before the horse.' " *Id.* at 456-57, 852 S.E.2d at 176.

¶ 50 "Once the trial court had *substantial evidence* that defendant may have been incompetent, it should have sua sponte (sic) conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial." *Id.* at 457, 852 S.E.2d at 176 (emphasis supplied).

¶ 51 Our Supreme Court held:

> In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

Id. at 456, 852 S.E.2d at 175–76.

¶ 52 Our Supreme Court further held:

> [T]he issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte (sic) competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. *Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance.*

> Rather, our decision is based on our *consideration of all the evidence in the record when viewed in its totality*.

Id. at 466, 852 S.E.2d at 182 (emphasis supplied).

¶ 53 During Defendant's trial, the trial court did not have a detailed mental health history nor was substantial evidence presented or any prior notice or actions tending to show Defendant may have been incompetent. In *Sides*, the court was provided with a large amount of evidence and history, including physicians' diagnoses and recommendations concerning the defendant's documented mental health concerns. The trial court was informed the defendant had "a number of medical conditions by her and her family" and defense counsel offered to obtain more information from her doctors. *Id.* at 451, 852 S.E.2d at 173.

¶ 54 Because nothing in Defendant's prior record, conduct, or actions provided the trial court with notice or evidence Defendant may have been incompetent, the court did not err by declining to conduct a more intensive hearing on Defendant's capacity to proceed. The trial court had the opportunity to personally observe Defendant's conduct and demeanor, heard arguments from both the State and defense counsel, and took evidence concerning Defendant's competency.

¶ 55 The State argued Defendant had answered questions appropriately and clearly and was able to participate in trial and confer and communicate with counsel. The State also argued Defendant's decision to harm himself had no bearing on whether he possessed the mental capacity to assist in his own defense. Defense counsel challenged his client's competency under N.C. Gen. Stat. § 15A-1002 and stated jumping sixteen feet from the second-floor mezzanine may have been a suicide attempt.

¶ 56 Also, without the jury present, the trial court heard testimony from Shana Withers, a public defender investigator, who testified about her visit with Defendant at the hospital where he was being treated.

¶ 57 Additionally, the trial court heard from a jailhouse deputy, Darrell Griffin, who was present when Defendant jumped from the second-floor mezzanine. He testified Defendant had not previously demonstrated prior episodes of mental or emotional disturbance and described the scene when Defendant jumped from the second-story mezzanine. After hearing the testimony of Withers, Officer Griffin and viewing recorded footage of Defendant dropping from the mezzanine, the trial court found Defendant had voluntarily absented himself from the proceedings.

¶ 58 This Court has stated, "a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *Staten*, 172 N.C. App. at 678, 616 S.E.2d at 654-55 (citation omitted). "Failure of the trial court to protect a defendant's right not to be tried or convicted while mentally incompetent deprives him of his due process right to a fair trial." *State v. McRae*, 139 N.C. App. 387, 389, 533 S.E.2d 557, 559 (2000) (citations omitted). "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry." *Id.* at 390, 533 S.E.2d at 559 (citation and quotation marks omitted).

¶ 59 Here, and unlike the facts in *Sides*, Defendant engaged in two lengthy colloquies with the trial court and later waived his right not to testify. These colloquies lead to this Court's analysis in *State v. Staten*.

¶ 60 In *Staten*, the defendant wanted to testify on his own behalf. *Staten*, 172 N.C. App. at 679, 616 S.E.2d at 655. The trial court conducted the following colloquy to determine the voluntariness of the defendant's testimony and his understanding of possible outcomes:

> [The Court]: All right. Mr. Staten, you have talked to your attorney concerning the question of whether or not you should testify or not in this case?
>
> [Defendant]: Yes Sir.
>
> [The Court]: And you understand that if you do testify the State can ask you a lot of questions on cross-examination about your prior record and things of that nature?
>
> [Defendant]: Yes sir.
>
> [The Court]: And you understand that may sway the jury somewhat? Sometimes it does. And it could be that it doesn't work out to your advantage.
>
> [Defendant]: Yes sir.
>
> [The Court]: Are you telling me now that even though you understand the consequences of your decision to testify you still want to go through with it?
>
> [Defendant]: I want to testify and tell everybody like came [sic] behind me and testified after I already testified and say something about me and I want to

> testify again to clear up what they have said like we did the last time.

Id. at 679-80, 616 S.E.2d at 655.

¶ 61 The Court found "the defendant's replies were lucid and responsive, demonstrating his desire to testify and displaying his understanding of the consequences of doing so." *Id.* at 680, 616 S.E.2d at 655. These factors demonstrated the defendant was competent to stand trial. *Id.*

¶ 62 Here, two similar colloquies between the trial court and Defendant occurred. The trial court inquired about Defendant's voluntariness to testify on his own behalf.

> THE COURT: [Defendant], have you been able to go over with your attorneys your choice of whether or not to testify?
>
> THE DEFENDANT: Yes, Your honor.
>
> THE COURT: Just answer yes or no. You have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And have they answered all your questions about that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And how are you feeling today? Is your mind clear?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you taking any kind of medicines or any kind of substances at all that would affect how you think or feel?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: So your mind is clear as we have this conversation?
>
> THE DEFENDANT: Correct, yes, sir.
>
> THE COURT: And you realize you have the right not to testify?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: Do you also realize, as a result of your conversation with the attorneys, that you have the right to testify?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You have both of those rights.
>
> THE DEFENDANT: Right.
>
> THE COURT: And you understand that at this juncture, at this point in the trial, it is your decision entirely as to whether or not you decide to testify or not. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: It is not your lawyer's decision, it's not the DA's decision, it's not my decision, it's your decision and your decision alone. So have you been able to think some this afternoon about whether or not you want to testify?
>
> THE DEFENDANT: Yes, sir, I have.
>
> THE COURT: And what is your decision?
>
> THE DEFENDANT: I'm not going to testify.

¶ 63 The following Monday, after the weekend recess, the trial court conducted another colloquy with Defendant to determine whether he had changed his mind over the weekend. Like the exchanges in *Staten*, these colloquies and Defendant's answers to the trial court's questions also demonstrate and support a presumption and the trial court's conclusion of Defendant's competence. Defendant engaged in lengthy colloquies with the trial court, Defendant's responses were "lucid and responsive." *Id.*

¶ 64 Here, unlike in *Sides*, the trial court heard and considered the evidence necessary to determine Defendant's competency, no substantial evidence tends to show or support a finding Defendant may have been incompetent. The trial court was not required to hold an additional *sua sponte* competency hearing. The court had conducted the appropriate fact-intensive inquiry and found and concluded Defendant had voluntarily waived his right to be present at trial.

¶ 65 The trial court considered the facts that Defendant did not display any inappropriate conduct at trial, nor that Defendant had a prior

medical history, which raised any question of his competence. The trial court did not err in denying the defense motion for further inquiry into Defendant's capacity. Defendant's argument is without merit and is overruled. *Sides*, 376 N.C. at 466, 852 S.E.2d at 181–82.

V. Jury Instruction

¶ 66 **[2]** Defendant argues the trial court's jury instruction on sexual offense deprived Defendant of his right to a unanimous jury verdict. The trial court's instruction states, *inter alia*:

> A sexual act means either cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another. Fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another. Anal intercourse, which is any penetration, however slight, of the anus of any person by the male sex organ of another. Or any penetration, however slight, by an object into the genital or anal opening of a person's body.

¶ 67 The trial court instructed the jury it could find Defendant guilty of a first-degree sexual offense, if, in addition to the other required elements it found Defendant had engaged in fellatio or anal intercourse. These are not disparate crimes, but are "merely alternative ways of showing the commission of a sexual act." *State v. Petty*, 132 N.C. App. 453, 463, 512 S.E.2d 428, 434-35 (1999).

¶ 68 The unchallenged evidence from Hannah's testimony meets the statutory requirements of N.C. Gen. Stat. §14-27.26 (2019). Our Supreme Court and our Court have consistently held a jury verdict does not need to make a specific finding regarding precisely which sexual acts proscribed by N.C. Gen. Stat. § 14-27.26 defendant committed. *See State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990); *State v. McCarthy*, 326 N.C. 782, 392 N.C. 359 (1990); *State v. Petty*, 132 N.C. App. 453, 512 S.E.2d 428 (1999). We are bound by our Supreme Court's and this Court's prior precedents. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's argument is overruled.

VI. Conclusion

¶ 69 The trial court properly denied Defendant's counsel's motion to conduct an additional inquiry into his capacity to proceed following his intentional act to injure himself, to voluntarily absent himself from trial. The trial court's jury instruction on first-degree sexual offense, which

can be committed by multiple acts, did not deprive Defendant of his right to a unanimous jury verdict.

¶ 70 If Defendant required greater specificity, he could have moved for a bill of particulars under N.C. Gen. Stat. § 15A-925 (2019) and/or for a special verdict sheet under N.C. Gen. Stat. § 15A-1340.16 (2019).

¶ 71 Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges COLLINS and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
WILBERT HENDRICKS

No. COA20-718

Filed 4 May 2021

Probation and Parole—subject matter jurisdiction—to revoke probation—after probationary period expired

The trial court lacked subject matter jurisdiction to revoke defendant's probation pursuant to N.C.G.S. § 15A-1344(f) because defendant's probation officer did not file violation reports until after the probationary period—which included defendant's active sentence as part of his special probation—had already expired.

Appeal by Defendant from Judgment entered 10 March 2020 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Mary McCullers Reece for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Wilbert Hendricks (Defendant) appeals from the trial court's Judgment and Commitment upon Revocation of Probation entered 10 March 2020 activating Defendant's 29- to 47-month suspended sentence. The Record reflects the following:

¶ 2 On 2 December 2013, a Watauga County Grand Jury indicted Defendant on one count of Aggravated Felony Serious Injury by Vehicle. As evidenced by Defendant's Transcript of Plea, Defendant pled guilty to one count each of: Aggravated Felony Serious Injury by Vehicle (13 CRS 51810); Driving While Impaired (13 CRS 51807); and Injury to Real Property (13 CRS 51809). The trial court entered Judgment Suspending Sentence imposing a suspended 29- to 47-month active sentence and a 60-month period of supervised probation. The trial court did not check box 3 on the Judgment form indicating the period of probation was to begin after Defendant was released from incarceration, but the trial court did note on the form that Defendant's probation was to be "stayed until defendant is released from custody." The trial court further imposed an active sentence of 330 days as conditions of special probation pursuant to N.C. Gen. Stat. § 15A-1351.

¶ 3 Defendant began his active sentence in 13 CRS 51810 on 7 October 2014 and then served a brief 26-day sentence for Misdemeanor Injury to Real Property. Defendant began his supervised probation on 28 September 2015. Defendant's probation officer filed probation violation reports on 23 January 2020, 5 February 2020, and 25 February 2020. Defendant's probation revocation hearing came on for trial on 10 March 2020. After receiving evidence and testimony, the trial court found Defendant willfully violated the terms of his probation—the trial court revoked Defendant's probation and activated his suspended sentence. Defendant gave oral Notice of Appeal in open court. That same day, the trial court entered Judgment and Commitment upon Revocation of Probation revoking Defendant's probation and activating his suspended 29- to 47-month suspended sentence.

Issue

¶ 4 The issue on appeal is whether the Superior Court lacked subject-matter jurisdiction to revoke Defendant's probation because Defendant's probation officer filed violation reports after the probationary period expired.

Analysis

¶ 5 Defendant argues the trial court lacked subject-matter jurisdiction to revoke his probation because the probation period, as imposed, had already expired. The State agrees and so do we.

¶ 6 "A trial court must have subject matter jurisdiction over a case in order to act in that case." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (citation omitted). "Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *Id.* at 293, 644 S.E.2d at 27 (citation omitted). "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted). Whether the trial court had subject-matter jurisdiction per our General Statutes is an issue requiring this Court to conduct a statutory analysis, and, thus, a de novo review. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

¶ 7 N.C. Gen. Stat. § 15A-1344(f) provides:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f) (2019).

¶ 8 As to special probation, N.C. Gen. Stat. § 15A-1351 provides:

> The original period of probation, *including the period of imprisonment required for special probation*, shall be as specified in G.S. 15A-1343.2(d), but *may not exceed a maximum of five years*, except as provided by G.S. 15A-1342(a). The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

N.C. Gen. Stat. § 15A-1351(a) (2019) (emphasis added). N.C. Gen. Stat. § 15A-1342 allows for extending probation with the defendant's consent:

> beyond the original [probationary] period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the original period of probation. Any probationary judgment form provided to a defendant on supervised probation shall state that probation may be extended pursuant to this subsection.

N.C. Gen. Stat. § 15A-1342(a) (2019).

¶ 9 Here, the trial court originally sentenced Defendant to an intermediate punishment of special probation for 60 months, including an active sentence of 330 days. Therefore, under N.C. Gen. Stat. § 15A-1351(a), Defendant's total probationary period included his 330-day active sentence. Defendant began serving his active sentences on 7 October 2014. Thus, at the latest, Defendant's probationary period began on 3 November 2014, after Defendant served his 26-day sentence for Misdemeanor Injury to Real Property. As such, Defendant's 60-month probationary period would have ended, at the latest, on 3 November 2019. Because Defendant's probation officer did not file violation reports until 23 January 2020 at the earliest, the violation reports were not filed before Defendant's probationary period had ended pursuant to N.C. Gen. Stat. § 15A-1344(f). Consequently, the trial court lacked subject-matter jurisdiction to revoke Defendant's probation and activate his suspended sentence. *Reinhardt*, 183 N.C. App. at 293, 644 S.E.2d at 27. Therefore, we vacate the trial court's Judgment and Commitment upon Revocation

of Probation. *State v. Tincher*, 266 N.C. App. 393, 398, 831 S.E.2d 859, 863 (2019).

Conclusion

¶ 10 Accordingly, for the foregoing reasons, we conclude the trial court lacked subject-matter jurisdiction to revoke Defendant's probation; thus, we vacate the Judgment and Commitment upon Revocation of Probation.

VACATED.

Judges DIETZ and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JOHN CHARLES HENSLEY

No. COA20-330

Filed 4 May 2021

Criminal Law—prosecutor's closing argument—personal opinion—not grossly improper—reasonable inference from the evidence

At a trial for taking indecent liberties with a child, where defendant denied intentionally touching his young daughters' breasts because he "lacked feeling" in his hands, the trial court did not err by failing to intervene ex mero motu during the State's closing argument when the prosecutor called defendant's testimony "a ridiculous excuse." Although the prosecutor should not have expressed his personal belief, his remarks were not "grossly improper" because they were a small part of an otherwise proper argument: that the jury should not believe defendant's testimony given that defendant easily used his fingers to adjust a microphone on the witness stand and to unwrap small candies at the defense table. Furthermore, the prosecutor's argument that defendant wanted to access his younger daughter's phone to look at inappropriate photos of her was a reasonable inference drawn from the evidence at trial and, therefore, was not grossly improper.

Appeal by Defendant from judgments entered 2 July 2015 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 9 February 2021.

STATE v. HENSLEY

[277 N.C. App. 308, 2021-NCCOA-185]

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle M. McCullen, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 This appeal arises from Defendant's conviction for five counts of taking indecent liberties with a minor. Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's closing argument. We discern no error.

I. Procedural History and Factual Background

¶ 2 On 4 February 2013, Defendant John Charles Hensley was indicted on seven counts of taking indecent liberties with a minor, one count of a statutory sex offense with a person who is 13, 14, or 15 years old by a defendant at least 6 years older, and one count of sexual battery. On 29 June 2015, Defendant's case came on for jury trial.

¶ 3 The evidence at trial tended to show the following: In the fall of 2012, Rebecca and Stephanie[1] resided in Yancey County with Defendant, who is their biological father; their stepmother; and their two half-brothers. Rebecca was in the 11th grade and Stephanie was in the 12th grade. The girls visited their mother every other weekend and during the summers. In September 2012, a representative from the girls' school called Defendant to inform him that Rebecca had exchanged text messages of a sexual nature with a boy from another school. Defendant picked up Rebecca's phone from the school and confronted Rebecca a week and a half later. He punished her by assigning her chores and an essay to write.

¶ 4 Several days later, after the girls returned from a weekend visit with their mother, Defendant asked Rebecca for the passcode to her phone. Rebecca refused to give it to him, and they argued until Defendant slapped Rebecca on the face. During the incident, Stephanie texted their mother to tell her what was happening, and their mother called the police. Deputy Tommy Fortner of the Yancey County Sheriff's Office came to the house later that evening and spoke to each girl outside on the porch.

¶ 5 The following day, Stephanie gave three letters to her teacher and two friends, disclosing that Defendant had inappropriately touched

1. Pseudonyms are used to protect the minors' privacy.

her. Stephanie had written these letters prior to the incident between Rebecca and Defendant because she "was getting tired of everything, of the emotional torment [she] was having." Detective Brian Shuford was assigned to the case after the Yancey County Department of Social Services received a sexual abuse report from the girls' school. Shuford and a social worker interviewed each girl separately.

¶ 6 Rebecca testified at trial that Defendant regularly made statements to her that made her uncomfortable. He repeatedly made fun of the size of her breasts, pulled at her shirt, and told her that her breasts were small. Rebecca described one incident that occurred when she was in 9th grade, testifying that she was doing homework in the computer room late at night when Defendant came in and sat down next to her. Defendant moved his seat behind her, pushed up her tank top, and touched her breasts for a long time. Rebecca testified that she had not asked Defendant to touch her anywhere on her stomach or breasts, and that she did not want him to touch her. She explained that she had never previously told anyone about the incident because she "was embarrassed and disgusted with [her]self."

¶ 7 During Defendant's interview with Shuford on 2 October 2012, Defendant said that he had been aggravating Rebecca about the size of her breasts and comparing them to Stephanie's. Defendant brought up the incident in the computer room and said that Rebeca had been complaining about menstrual cramps so he had rubbed her stomach underneath her shirt. Defendant testified that he felt Rebecca's ribcage with the heel of his hand and that he may have unintentionally touched her breast because he did not have feeling in his hand. While Defendant was testifying, the prosecutor asked Defendant to adjust the microphone, which he did successfully. The prosecutor then pointed out to the jury that Defendant could adjust the microphone on the witness stand and open candy wrappers at the defense table, but Defendant still denied possessing feeling in his hands or fingers.

¶ 8 Stephanie testified that Defendant touched her inappropriately beginning in the 6th grade when she was approximately 12 years old. She said that Defendant first came into the room she shared with Rebecca at night, lifted her shirt up, and began touching her breasts. According to Stephanie, this happened repeatedly during her 6th grade year. At the time, she only told her best friend, who immediately stopped speaking to her. She then explained that during her 7th grade year, Defendant began touching her vaginal area in addition to her breasts. She testified that Defendant would kiss, bite, and lick her breasts. Stephanie explained

that this behavior stopped when they moved into a smaller house where she and Rebecca slept in the living room, but after they moved again, two more incidents occurred between January and February 2010.

¶ 9 During one incident, Defendant came into Stephanie's room and began touching her breasts and vagina. Stephanie started kicking Defendant, trying to make him stop, but he told her to relax and continued touching her. Eventually, Stephanie hit her head on the wall, and Defendant left after his wife called out asking if everything was okay. Defendant denied ever touching Stephanie's vagina or putting his mouth on her breasts. He testified that if he ever touched her breasts with his hands, it would have been inadvertent.

¶ 10 After the close of all evidence, the State delivered its closing argument wherein the prosecutor stated that Defendant's excuse for possibly touching his daughters' breasts—that he lacked feeling in his hands and fingers—was "ridiculous." He explained that Defendant could adjust a microphone and open candy wrappers, which Defendant demonstrated during the trial. The prosecutor also stated that the fight between Defendant and Rebecca over her phone occurred because "he wanted to get in, and I guess see what was in there, what those pictures were, what those text messages were." He explained, "it makes a lot more sense when you put it in the context of a father who has a sexual attraction to his daughters." Defendant did not object to any of the statements made during State's closing argument.

¶ 11 On 1 July 2015, the jury found Defendant guilty of five of the seven indecent liberties charges and acquitted him of the remaining charges. The court sentenced Defendant to five consecutive sentences of 16 to 20 months' imprisonment. Defendant failed to give timely written notice of appeal from his conviction and sentencing, but he filed a petition for writ of certiorari on 18 June 2019. This Court granted Defendant's petition on 1 July 2019.

II. Discussion

¶ 12 Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's closing argument when the prosecutor characterized Defendant's testimony as "a ridiculous excuse" and argued that Defendant wanted to access Rebecca's phone to look at inappropriate photos of her.

¶ 13 When a defendant fails to object at trial during a closing argument, the defendant must demonstrate that the argument was "so grossly improper that the trial court committed reversible error in failing to intervene

ex mero motu to correct the error." *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 410 (1986). "To make this showing, [a] defendant must demonstrate that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (quotation marks and citation omitted). "The control of the arguments of counsel must be left largely to the discretion of the trial judge, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (citations omitted).

¶ 14 Counsel's argument is improper if counsel "become[s] abusive, inject[s] his personal experiences, express[es] his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make[s] arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230(a) (2019). Counsel "may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." *Id.* "Within these statutory confines, [the court has] long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Huey*, 370 N.C. 174, 180, 804 S.E.2d 464, 469 (2017) (quotation marks and citations omitted). "In determining whether [an] argument was grossly improper, th[e] [c]ourt considers the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole[.]" *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (quotation marks and citations omitted).

¶ 15 In *Taylor*, the prosecutor's remarks during closing argument were not grossly improper where the prosecutor expressed disbelief regarding defendant's claim that he fired a gun without aiming. *Id.* Specifically, the prosecutor said to the jury, without objection from defendant, "I know that you didn't believe it, just like I don't," referring to the defendant's version of events. The Supreme Court concluded that "[a]lthough the prosecutor should not have indicated his personal disbelief of defendant's statement, given the overall context and the brevity of the remark, it was not 'so grossly improper' as to render the proceeding 'fundamentally unfair.' " *Id.* at 537, 669 S.E.2d at 259-60 (citation omitted).

¶ 16 In *Campbell*, the prosecutor's remarks implying that defendant intended to rob a store were not grossly improper where the prosecutor,

citing certain evidence rhetorically asked, "Is it too far of a leap to say that he was bent on robbing that place when he had $5.31 in a brown bag, and whatever change is in this one?" 359 N.C. at 675, 617 S.E.2d at 21. As the prosecutor could reasonably argue the inference from the evidence that defendant was staking out the store in order to rob it, the remarks "were not so grossly improper as to require intervention *ex mero motu* by the trial court." *Id.* at 676, 617 S.E.2d at 21.

¶ 17 Here, the prosecutor's categorization of Defendant's testimony as "a ridiculous excuse" was a small part of an otherwise proper argument that the jury should not believe Defendant's claim that a lack of feeling in his fingers prevented him from knowing if he had touched his daughters' breasts, because Defendant demonstrated that he could utilize his fingers effectively by adjusting the microphone on the witness stand and unwrap and squeeze little candies out of their packaging at the defense table. Additionally, the prosecutor used the word "ridiculous" only twice in his closing argument, which totaled 16 pages of trial transcript. Although the prosecutor should not have expressed his personal belief that Defendant's testimony was false, *see* N.C. Gen. Stat. § 15A-1230(a), as in *Taylor*, given the overall context and the brevity of the remarks, his remarks were not " 'so grossly improper' as to render the proceeding 'fundamentally unfair.' " *Taylor*, 362 N.C. at 537, 669 S.E.2d at 259-60 (citation omitted).

¶ 18 Additionally, the prosecutor's argument that Defendant wanted to access Rebecca's phone to look at inappropriate photos was a reasonable inference from the evidence introduced at trial. The evidence showed the following: Defendant would look at and talk about Rebecca's breasts; Defendant would pull at her shirt, usually from the top, and say her breasts were small; when Rebecca was fourteen, Defendant sat down beside her while she was doing her homework on the computer and pushed up her tank top and touched her breasts. This evidence permitted the prosecutor to argue the inference that Defendant had a sexual attraction to his daughter and would be interested in accessing her phone to view sexual photos of her. Accordingly, the prosecutor's argument was not improper and, as in *Campbell*, the trial court was not required to intervene ex mero motu. *See Campbell*, 359 N.C. at 687, 617 S.E.2d at 28.

III. Conclusion

¶ 19 The trial court did not err by failing to intervene ex mero motu during the State's closing argument where the prosecutor's categorization of Defendant's testimony as "a ridiculous excuse" was not grossly im-

proper and the prosecutor's argument that Defendant wanted to access Rebecca's phone to look at inappropriate photos was not improper.

NO ERROR.

Judges GORE and JACKSON concur.

STATE OF NORTH CAROLINA
v.
SHANION J. DONTA WATSON

No. COA20-147

Filed 4 May 2021

1. Appeal and Error—preservation of issues—sufficiency of evidence—motion to dismiss

On appeal from his conviction for first-degree murder, where defendant's argument that the trial court erroneously instructed the jury on felony-murder actually implicated sufficiency of the evidence issues, defendant properly preserved the issue by making a motion to dismiss for insufficiency of the evidence at the close of the State's evidence and renewed the motion after the jury verdict but before judgment was entered, in accordance with N.C.G.S. § 15A-1227.

2. Homicide—felony murder—predicate felony—statutory rape—intent element

In a first-degree murder trial, statutory rape could be used as the predicate felony under the felony-murder rule because, despite defendant's argument that statutory rape lacks an actual intent element as required by N.C.G.S. § 14-17(a), commission of the offense only requires the intent to commit a sexual act with the victim. Rape is a general intent crime, and statutory rape is a strict liability offense only in that knowledge of the victim's age is not required for commission of the offense, and therefore consent and mistake of age are not available defenses.

3. Homicide—felony murder—acquitted of predicate felony—murder conviction stands

In a prosecution for first-degree murder based on the felony-murder rule, for which statutory rape served as the predicate

felony, there was no error in defendant's murder conviction even though he was acquitted of statutory rape. Although defendant argued that the verdicts were inconsistent, they were not legally contradictory where sufficient evidence was presented from which the jury could have convicted defendant of both felony murder and the underlying statutory rape.

Appeal by defendant from judgments entered 12 July 2019 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Anne M. Middleton and Sherri Horner Lawrence, for the State.

Michael E. Casterline for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Shanion J. Donta Watson appeals from judgments entered upon a jury's verdicts finding him guilty of first-degree murder under the felony-murder rule, felony larceny of a motor vehicle, and felony child abuse inflicting serious mental injury. On appeal, Defendant argues that we must vacate his first-degree murder conviction for two reasons: first, because the predicate felony underlying his conviction under the felony-murder rule—statutory rape of a child under the age of 13—lacks an intent element, and second, because the jury acquitted Defendant of the predicate felony. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

¶ 2 In December 2015, Chiquita Adams was living with her 11-year-old daughter, Tracy,[1] in Greensboro, North Carolina. Defendant was Ms. Adams' boyfriend. On the night of 24 December 2015, Ms. Adams and Tracy stayed in a hotel in High Point, North Carolina. Ms. Adams drove them there, and Defendant arrived at the hotel about an hour after Ms. Adams and Tracy checked in.

¶ 3 Tracy fell asleep at around 10:00 p.m. She awoke at approximately 2:00 a.m. and saw Defendant on the floor next to her bed. Defendant

1. In accordance with N.C.R. App. P. 42, we refer to the juvenile by a pseudonym in order to protect her identity.

grabbed Tracy's leg, picked her up, and carried her to the bathroom; she could not scream because he had his hand covering her mouth. However, Tracy was able to grab a pillow from the bed and threw it toward her mother. After Defendant placed Tracy on the bathroom sink and told her to "be quiet," Ms. Adams opened the bathroom door. Tracy told her mother, "Please don't leave me," and Defendant told Ms. Adams, "don't believe her." When Ms. Adams approached Defendant, he knocked her to the floor and began hitting and choking her. After Ms. Adams lost consciousness, Defendant placed her on the bed and returned to the bathroom, telling Tracy, "pull your pants down." Ms. Adams awakened, and she and Tracy tried to exit the hotel room, but Defendant stopped them. Ms. Adams and Defendant then engaged in a prolonged struggle. At one point, Tracy tried to use her cell phone—a Christmas gift from her father—to call 911, but Defendant grabbed it from her and put it in his pocket.

¶ 4 While Ms. Adams fought with Defendant, Tracy was in the bathroom screaming and praying. When she looked out of the bathroom, she saw her mother on the bed, not moving. Defendant again told Tracy to pull her pants down; this time, she did, and Defendant had sexual intercourse with her on the bed. Eventually, Defendant let her get up, and she ran to the bathroom and locked the door.

¶ 5 At some point, Tracy fell asleep in the hotel bed. When she awoke at around 11:00 a.m., Defendant was still in the hotel room. Defendant told Tracy that Ms. Adams was asleep. Tracy touched her mother's body and noticed that she was not breathing. Tracy had "a feeling that she was dead" but "didn't want to believe it fully." Defendant told Tracy to take a shower, so she did, and when she came out of the bathroom, Defendant had left with Ms. Adams' car keys. The hotel housekeeper came to the door and asked where Tracy's mother was. At first, Tracy told the housekeeper that her mother was asleep. Then she began to cry and said, "I don't know, I don't know. Help me, help me." The housekeeper called 911.

¶ 6 The High Point Fire Department responded to the call first. After reporting that Ms. Adams was dead, the firefighters waited for law enforcement officers and paramedics to arrive. Upon arrival at the scene, a High Point Police Department officer spoke with Tracy, who told him that Defendant was her mother's boyfriend and provided Defendant's name. She told police that her cell phone and her mother's car were missing, and that she had tried to wake her mother up that morning, but she could not rouse her. Tracy appeared to law enforcement officers to be in shock; she did not tell the officers about the altercation between Defendant and her mother or that Defendant had sexual intercourse with her.

¶ 7 A phone carrier assisted detectives in determining the location of Tracy's cell phone, which was "pinging" from an apartment in High Point. Upon their arrival to the apartment, the detectives spotted Ms. Adams' tan Hyundai Sonata parked out front. A canine officer discovered Tracy's cell phone behind the apartments. A phone carrier forwarded to detectives text messages sent from Defendant's cell phone to his sister's cell phone. Detectives went to Defendant's sister's apartment, and she told them that Defendant had been there earlier that afternoon, showered, changed his clothes, and left. Officers collected Defendant's discarded clothes, which included clothing that matched the outfit he appeared to be wearing in video-camera footage captured when he left the hotel room. The shirt had a reddish stain on it.

¶ 8 An officer took Tracy to the Hope House Children's Advocacy Center ("CAC"). A child interviewer with the CAC told Tracy that her mother was dead. Tracy told the interviewer that she had been asleep all night and did not hear anything.

¶ 9 Detectives arrested Defendant at his sister's apartment at around 10:00 p.m. on 26 December 2015.

¶ 10 On 28 December 2015, the Medical Examiner conducted an autopsy of Ms. Adams' body that revealed that she had facial lacerations; bruises, abrasions, and lacerations in her mouth and on her tongue; and evidence of strangulation, including hemorrhages of the eyes, an abraded contusion on her neck, hemorrhaging in the muscles of her neck, and two fractures of the cricoid cartilage. The medical examiner concluded that Ms. Adams died as a result of strangulation.

¶ 11 On 28 December 2015, Tracy's father arrived in North Carolina from Texas to pick up Tracy, and Tracy moved to Texas to live with him. In Texas, Tracy struggled in school, did not have many friends, did not want to sleep in a room by herself, and suffered from panic attacks. Tracy still had not told anybody what had happened to her or what she saw. Finally, in July 2017, she told her father what had happened. During an interview at a CAC in Texas, Tracy told an interviewer that Defendant had raped her and killed her mother.

¶ 12 On 12 July 2016, a Guilford County grand jury indicted Defendant for larceny of a motor vehicle, child abuse inflicting serious mental injury, and first-degree murder. On 15 August 2017, a Guilford County grand jury indicted Defendant for statutory rape of a child by an adult, in violation of N.C. Gen. Stat. § 14-27.23.

¶ 13 Defendant was tried during the 24 June 2019 session of Guilford County Superior Court before the Honorable David L. Hall. Defendant

represented himself, with standby counsel appointed. At the close of the State's evidence, Defendant moved to dismiss the charges for insufficiency of the evidence. The trial court denied Defendant's motion. The trial court instructed the jury on first-degree murder, on the bases of both premeditation and deliberation and on the felony-murder rule, with statutory rape as the predicate felony. The trial court also instructed the jury on second-degree murder, statutory rape of a child by an adult, felony larceny of a motor vehicle, and felony child abuse inflicting serious mental injury.

¶ 14 The jury convicted Defendant of first-degree murder under the felony-murder rule, felony larceny of a motor vehicle, and felony child abuse inflicting serious mental injury. The jury acquitted Defendant of statutory rape. After the jury rendered its verdicts, standby counsel renewed Defendant's motion to dismiss for insufficiency of the evidence.

¶ 15 The trial court consolidated judgment on Defendant's convictions for felony larceny of a motor vehicle and felony child abuse, entering one judgment on those convictions and one judgment on the conviction for first-degree murder. The trial court sentenced Defendant to life imprisonment without the opportunity for parole for the murder conviction, and imposed a consecutive 19- to 32-month sentence for the larceny and child-abuse convictions. Defendant noticed appeal in open court.

Discussion

¶ 16 On appeal, Defendant contends that this Court must vacate his conviction for first-degree murder based on the felony-murder rule for two interrelated reasons. First, Defendant contends that the predicate felony of statutory rape of a child under the age of 13 cannot support a felony-murder conviction because statutory rape lacks an intent element. Defendant argues that, because statutory rape is a strict-liability offense, it therefore lacks an intent element, and only *attempted* statutory rape—which Defendant concedes does include an intent element—could support felony murder. However, Defendant argues that in the instant case, the trial court did not properly instruct the jury on the charge of attempted statutory rape, and therefore, neither completed nor attempted statutory rape could support the felony murder conviction.

¶ 17 Defendant also raises a second, related argument: he contends that his first-degree murder conviction must be vacated because the jury acquitted him of the predicate felony underlying the State's theory of felony murder. According to Defendant, because the jury was not instructed on attempted statutory rape, it could not properly consider that offense

in support of its felony-murder verdict; thus, his first-degree murder conviction must be vacated.

¶ 18 After careful review, we hold that statutory rape sufficiently supported Defendant's felony-murder conviction on the present facts, and that he is not entitled to vacatur of his conviction based on his acquittal of the predicate felony. Having so concluded, we need not address Defendant's argument that the jury was not properly instructed on attempted statutory rape. Therefore, we conclude that Defendant received a trial free from error.

I. Preservation

¶ 19 **[1]** As a preliminary matter, although Defendant characterizes the trial court's alleged error as one relating to erroneous jury instructions, in fact, much of Defendant's argument sounds in sufficiency of the evidence issues. However, defense counsel conceded at oral argument before this Court that the State presented sufficient evidence to send the charge of statutory rape to the jury. Defendant's argument on appeal is, in essence, an argument that the charge of completed statutory rape is insufficient as a matter of law to support a felony-murder conviction, and in the alternative, that an acquittal of statutory rape renders the conduct insufficient as a matter of law to support a felony-murder conviction. The State argues that Defendant failed to preserve any sufficiency of the evidence issues for appeal by failing to make a properly timed motion to dismiss. We conclude that Defendant adequately preserved any sufficiency arguments.

¶ 20 At the close of the State's evidence, Defendant moved to dismiss the charges for insufficiency of the evidence, which the trial court denied. Standby counsel, on behalf of Defendant, renewed the motion to dismiss after the jury rendered its verdicts but before the trial court entered judgment. This motion complied with N.C. Gen. Stat. § 15A-1227, which governs motions for dismissal for insufficient evidence:

> (a) A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made at the following times:
>
> . . . .
>
> (3) After return of a verdict of guilty and before entry of judgment.
>
> (b) Failure to make the motion at the close of the State's evidence or after all the evidence is not a bar

> to making the motion at a later time as provided in subsection (a).

N.C. Gen. Stat. § 15A-1227(a)(3), (b) (2019).

¶ 21 We therefore conclude that Defendant properly preserved an objection to the sufficiency of the evidence. *See State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (holding that a defendant preserves all insufficiency of the evidence issues by making a timely motion to dismiss).

II. Statutory Rape as Predicate Felony

¶ 22 **[2]** Defendant argues that statutory rape is a strict-liability offense, and as such, it cannot serve as a predicate felony for a felony-murder charge because it lacks any element of criminal intent. We disagree.

¶ 23 Section 14-17(a) of the North Carolina General Statutes defines first-degree murder and enumerates the offenses that may serve as predicate felonies for first-degree murder under the felony-murder rule: "A murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" Our Supreme Court has noted that the predicate crimes listed in § 14-17(a) share a common requirement: "actual intent on the part of the accused to commit the crime." *State v. Jones*, 353 N.C. 159, 169, 538 S.E.2d 917, 925 (2000).

¶ 24 Here, the State predicated Defendant's felony-murder charge on the crime of statutory rape of a child by an adult, as defined by N.C. Gen. Stat. § 14-27.23(a): "A person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." The crime of statutory rape does not require proof of knowledge of the child's age, and it "requir[es] nothing more than commission of the act prohibited" to support a conviction. *State v. Anthony*, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000).

¶ 25 Defendant argues that statutory rape lacks the necessary intent to support a felony-murder charge—the "actual intent on the part of the accused to commit the crime." *Jones*, 353 N.C. at 169, 538 S.E.2d at 925. We disagree with Defendant's interpretation of "strict-liability offense." Rape is a general-intent crime. *Id.* at 167, 538 S.E.2d at 924. "[T]he forbidden conduct under the statutory rape provision is the act of intercourse itself[.]" *State v. Weaver*, 306 N.C. 629, 637, 295 S.E.2d 375, 380 (1982) (citation omitted), *disapproved of on other grounds by State*

v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993). As such, statutory rape is a strict-liability offense only in that consent and mistake of age are not valid defenses. *Anthony*, 133 N.C. App. at 579, 516 S.E.2d at 198–99. We do not take those limitations on *defenses* to mean that the commission of statutory rape does not require the intent to commit an act, that is, sexual intercourse, or "the slightest penetration of the sexual organ of the female by the sexual organ of the male." *State v. Murry*, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970).

¶ 26 Defendant argues, however, that "[t]he *Jones* holding limits application of the felony murder rule to those felonies with an actual intent element[.]" *Jones* involved an impaired-driving collision that resulted in two deaths; the defendant was convicted of, *inter alia*, first-degree murder under the felony-murder rule, with the crime of assault with a deadly weapon inflicting serious injury as the predicate felony. 353 N.C. at 162–63, 538 S.E.2d at 921. The defendant operated a motor vehicle in a culpably or criminally negligent manner such that it constituted a deadly weapon. *Id.* at 164–65, 538 S.E.2d at 922–23.

¶ 27 The Supreme Court examined N.C. Gen. Stat. § 14-17 and determined that

> three types of criminal conduct . . . qualify as first-degree murder: (1) willful, deliberate, and premeditated killings (category 1); (2) killings resulting from poison, imprisonment, starvation, torture, or lying in wait (category 2); and (3) killings that occur during specifically enumerated felonies or during a felony committed or attempted with the use of a deadly weapon (category 3). All of these categories require that the defendant have a *mens rea* greater than culpable or criminal negligence; that is, they all require that the defendant had actual intent to commit the act that forms the basis of a first-degree murder charge.

Id. at 166, 538 S.E.2d at 923–24 (citation and internal quotation marks omitted).

¶ 28 Importantly, the *Jones* Court noted that the conduct in category 3 does not necessarily require an intent to kill; "however, the actual intent to commit the underlying felony is required. This is not to imply that an accused must intend to break the law, but rather that *he must be purposely resolved to participate in the conduct that comprises the criminal offense*." *Id.* at 167, 538 S.E.2d at 924 (emphasis added).

¶ 29 Concluding that all of the enumerated felonies in the murder statute "require a level of intent greater than culpable negligence on the part of the accused[,]" *id.*, the *Jones* Court held that "culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge[,]" *id.* at 163, 538 S.E.2d at 922.

¶ 30 We disagree with Defendant that statutory rape is analogous to a culpably or criminally negligent offense and that it may not serve as a predicate felony for felony murder. Indeed, the logic of *Jones* seems to support a conclusion to the contrary. Statutory rape of a child by an adult requires that the defendant "engage[ ] in vaginal intercourse with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.23(a). We cannot imagine a scenario in which a defendant could "engage[ ] in vaginal intercourse with a victim" in a criminally negligent manner; rather, statutory rape, unlike impaired driving that results in death, such as that at issue in *Jones*, requires that the perpetrator "be purposely resolved to participate in the conduct that comprises the criminal offense." *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. This is true regardless of the fact that "an individual may commit the crime of statutory [rape] regardless of the defendant's mistake or lack of knowledge of the child's age" and regardless of the victim's alleged consent. *State v. Sines*, 158 N.C. App. 79, 84, 579 S.E.2d 895, 899, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003).

¶ 31 Defendant argues, however, that while attempted statutory rape possesses an intent element, *completed* statutory rape does not. In *Sines*, the defendant argued that "attempted statutory sexual offense is a logical impossibility under North Carolina law"[2] because "it is logically impossible to have the specific intent to commit a strict liability crime which does not require a specific intent." *Id.* at 84–85, 579 S.E.2d at 899–900. Our Court rejected this argument and explained that, in order to prove attempt—a specific-intent offense—"the State must show: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *Id.* at 85, 579 S.E.2d at 899 (citation and internal quotation marks omitted).

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2. Statutory sexual offense with a child by an adult is a slightly broader offense than statutory rape in that a defendant commits statutory sexual offense by engaging in a "sexual act," N.C. Gen. Stat. § 14-27.28, defined as any act of cunnilingus, fellatio, analingus, anal intercourse, or the penetration by any object of the genital or anal opening of a person's body, with a child who is under 13 years old. N.C.P.I.–Crim. 207.45A (2019).

¶ 32 In holding that attempted statutory sexual offense is a valid crime under North Carolina law, our Court rejected the defendant's argument that the offense does not require intent:

> [T]he intent required for attempted statutory sexual offense is the intent to engage in a sexual act. The intent element of attempted statutory sexual offense does not require that the defendant intended to commit a sexual act with an underage person, but only that [the] defendant intended to commit a sexual act with the victim. [The d]efendant's knowledge of [the] victim's age or [the] victim's consent are not defenses to the crime of attempted statutory sexual offense, just like these defenses are not valid if the crime of statutory sexual offense is completed.

Id. at 86, 579 S.E.2d at 900.

¶ 33 The logic and holding of *Sines* apply with equal force to the issue at hand. It is true that "the intent element of . . . statutory [rape] does not require that the defendant intend[ ]" to engage in vaginal intercourse with an underage person, because mistake or lack of knowledge of age is not a defense. *Id.* Nonetheless, both completed and attempted statutory rape require "that [the] defendant intend[ ] to commit a sexual act with the victim." *Id.*

¶ 34 Applying the analysis of the *Jones* and *Sines* decisions to the facts at hand, we conclude that the intent to commit the underlying act of sexual intercourse, inherent in the offense of statutory rape, satisfies the intent required for a crime to serve as the basis of a felony-murder charge. Thus, the trial court did not err in denying Defendant's motion to dismiss.

III. Acquittal of Statutory Rape

¶ 35 **[3]** Defendant further argues that his first-degree murder conviction must be vacated because the jury acquitted him of the predicate felony. Defendant's argument is, in essence, that the jury's verdicts—finding him guilty of felony murder, with statutory rape as the underlying felony, but not guilty of statutory rape—are inconsistent and contradictory. We disagree.

¶ 36 First-degree murder under the felony-murder rule does not require proof of premeditation and deliberation. *State v. Wright*, 282 N.C. 364, 369, 192 S.E.2d 818, 822 (1972). Instead, in felony-murder cases, "there is a fictional transfer of the malice which plays a part in the underlying

felony to the unintended homicide so that the homicide is deemed committed with malice." *State v. Gardner*, 315 N.C. 444, 456, 340 S.E.2d 701, 710 (1986). As we concluded above, statutory rape of a child under 13 by an adult may serve as the underlying felony in support of a charge of first-degree murder under the felony-murder rule. However, as explained below, the jury need not *convict* on the predicate felony where the evidence presented at trial is sufficient to support a conviction of both felony murder and the underlying felony.

¶ 37 In North Carolina, our jurisprudence distinguishes between verdicts that are inconsistent and those that are both inconsistent and legally contradictory. *See, e.g.*, *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). "It is firmly established that when there is sufficient evidence to support a verdict, mere inconsistency will not invalidate the verdict." *Id.* (citation and internal quotation marks omitted). However, verdicts that are inconsistent and contradictory entitle a defendant to relief. *Id.*

¶ 38 Verdicts are inconsistent when they reflect some logical flaw or compromise in the jury's reasoning. For example, in *Mumford*, the defendant was convicted of five counts of felony serious injury by vehicle but acquitted of the lesser offense of driving while impaired. *Id.* at 401, 699 S.E.2d at 916. Felony serious injury by vehicle, defined by N.C. Gen. Stat. § 20-141.4(a3), may be proved by a showing that the defendant "was engaged in the offense of impaired driving[.]" The Supreme Court concluded that these convictions were merely inconsistent, not legally contradictory, because conviction of serious injury by vehicle "does not require a *conviction* of driving while impaired . . . but only requires a finding that the defendant was engaged in the conduct described" by the offense of driving while impaired. *Mumford*, 364 N.C. at 401, 699 S.E.2d at 916. And because the State presented sufficient evidence to support the defendant's convictions for felony serious injury by vehicle, the defendant was not entitled to relief. *Id.*

¶ 39 On the other hand, a verdict is legally contradictory, or mutually exclusive, when it "purports to establish that the defendant is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* at 400, 699 S.E.2d at 915 (citation omitted). For example, where a defendant was convicted of one count of embezzlement and one count of obtaining property by false pretenses based on the same facts, the Supreme Court concluded that the verdicts were legally contradictory:

> [T]o constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to

> a trust relationship, and then wrongfully converted. On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other. . . .
>
> [Therefore] a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction[.]

State v. Speckman, 326 N.C. 576, 578, 391 S.E.2d 165, 166–67 (1990) (citations omitted).

¶ 40 Merely inconsistent verdicts do not entitle the defendant to relief. The United States Supreme Court settled the issue in *United States v. Powell*, in which the Court addressed an argument that acquittal of a predicate felony necessitated relief from conviction for the compound felony:

> [R]espondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results[.]

469 U.S. 57, 68, 83 L. Ed. 2d 461, 470–71 (1984).

¶ 41 Inconsistent verdicts, therefore,

> present a situation where "error," in the sense that the jury has not followed the court's instructions,

> most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course.

Id. at 65, 83 L. Ed. 2d at 468–69.

¶ 42 Here, Defendant's convictions are not legally contradictory. The State submitted three theories of murder to the jury: (1) first-degree murder based on premeditation and deliberation, (2) first-degree murder based on felony murder, and (3) second-degree murder. The trial court's instructions allowed the jury to find Defendant guilty of felony murder if it found that he killed Ms. Adams "while committing or while attempting to commit the crime of statutory rape of a child under the age of thirteen[.]" The jury found defendant guilty of first-degree murder based on felony murder but not guilty of the separately charged offense of statutory rape. But the jury may rely on the *act* of committing or attempting statutory rape in support of felony murder without a *conviction* of statutory rape. *See Mumford*, 364 N.C. at 401, 699 S.E.2d at 916; *see also* N.C. Gen. Stat. § 14-17(a) ("A murder . . . which shall be committed in the *perpetration or attempted perpetration* of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" (emphasis added)).

¶ 43 Further, had the jury found Defendant guilty of both felony murder and the predicate felony, the trial court would have been required to arrest judgment on the predicate felony because "a defendant may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution." *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896 (2003) (quoting *Gardner*, 315 N.C. at 460, 340 S.E.2d at 712). Moreover, the State could have proceeded solely on felony murder based on statutory rape without charging statutory rape; indeed, our Supreme Court in *State v. Carey* suggested that

> the better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration or attempt to perpetrate a felony under the provisions of G.S. 14-17, would be that the solicitor should not secure a separate indictment for the felony. If he does, and there is a conviction of both,

> the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule.

288 N.C. 254, 274, 218 S.E.2d 387, 400 (1975), *vacated in part on other grounds and remanded*, 428 U.S. 904, 49 L. Ed. 2d 1209 (1976). Under those circumstances, where the State presented sufficient evidence of the predicate felony, we would not doubt the jury's determination that the defendant committed the underlying offense merely because there was no conviction on the underlying offense.

¶ 44 That the jury's verdicts seem inconsistent does not entitle Defendant to relief because "it is unclear whose ox has been gored." *Powell*, 469 U.S. at 65, 83 L. Ed. 2d at 469. Defendant suggests that the jury reached the conclusions it did because it was unconvinced that Defendant perpetrated a statutory rape. However, "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [felony-murder charge], and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [predicate] offense." *Id.* at 65, 83 L. Ed. 2d at 468. Here, Defendant "is given the benefit of h[is] acquittal on the counts on which [ ]he was acquitted, and it is neither irrational nor illogical to require h[im] to accept the burden of conviction on the counts on which the jury convicted." *Id.* at 69, 83 L. Ed. 2d at 471.

Conclusion

¶ 45 We conclude that statutory rape sufficiently supported Defendant's felony-murder conviction and that the jury's verdicts were not legally contradictory. Accordingly, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges WOOD and JACKSON concur.

TOWN OF APEX v. RUBIN

[277 N.C. App. 328, 2021-NCCOA-187]

TOWN OF APEX, PLAINTIFF
v.
BEVERLY L. RUBIN, DEFENDANT

No. COA20-304

Filed 4 May 2021

Eminent Domain—direct condemnation—installation of sewer line—improper taking—erroneous conclusion of inverse condemnation—injunctive relief not precluded

In a direct condemnation action, in which a town's exercise of its statutory "quick-take" powers to declare an easement and install a sewer line across a resident's property was subsequently invalidated in a judgment entered in the resident's favor (on the basis that the taking was not for a public purpose and was therefore null and void), upon the town's motion for relief from enforcement of the judgment, filed in response to the resident's attempts to compel the town to remove the sewer line, the trial court erred by determining that the sewer line installation constituted an inverse condemnation and that therefore its judgment was moot and void. The trial court was not divested of jurisdiction to enforce the judgment despite having dismissed the direct condemnation action after the town completed the sewer line. However, since the resident did not seek mandatory injunctive relief in the direct condemnation action and the judgment did not provide for such relief, the order denying her a writ of mandamus was affirmed. She was free to seek injunctive relief in a separate action for trespass.

Appeal by Defendant from orders entered 21 January 2020 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 24 February 2021.

Nexsen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for Plaintiff-Appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton, and Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and B. Joan Davis, for Defendant-Appellant.

Johnston, Allison & Hord, P.A., by Susanne Todd and Maisha M. Blakeney, and Sever Storey, LLP, by Shiloh Daum, for amicus curiae North Carolina Advocates for Justice.

John Locke Foundation, by Jonathan D. Guze, amicus curiae.

INMAN, Judge.

¶ 1 Our Federal and State Constitutions protect us, our homes, and our lands from unrestrained government intrusion. Police cannot roam about our private property unfettered. U.S. Const. amend. IV; N.C. Const. art. I § 20. The military cannot forcibly occupy our homes during peacetime. U.S. Const. amend. III; N.C. Const. art. I § 31. And, most pertinent to this appeal, the State cannot take our property without both a public purpose and payment of just compensation. U.S. Const. amend. V; N.C. Const. art. I § 19.

¶ 2 Plaintiff-Appellee Town of Apex ("the Town") asks this Court to uphold the Town's continuing intrusion onto the land of a private citizen through a circuitous and strained application of North Carolina law on eminent domain and inverse condemnations. The Town's position, in essence and when taken to its logical conclusion, is as follows: (1) if a municipality occupies and takes a person's private property for no public purpose whatsoever, that private landowner can do nothing to physically recover her land or oust the municipality; (2) if the encroachment decreases the property's value, then the landowner's sole remedy is compensation by inverse condemnation; and (3) in all other instances, a landowner is powerless to recover or otherwise vindicate her constitutional rights. This is not the law, nor can it be consistent with our Federal and State Constitutions.

¶ 3 Defendant-Appellant Beverly L. Rubin ("Ms. Rubin") appeals from orders denying her motion to enforce a judgment in her favor in a direct condemnation action and granting the Town's motion to be relieved from that judgment. She asserts that, having successfully recovered title to her land after the Town's unlawful taking, she is entitled to repossess her property free of a sewer pipe installed by the Town. We agree with Ms. Rubin that mandatory injunctive relief may be available to her, but hold that it is not available in the direct condemnation action that was taken to final judgment without a request for or adjudication concerning the availability of injunctive relief. Instead, she may pursue mandatory injunctive relief against the Town to remedy its continuing encroachment through a claim for trespass.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 4 Many of the facts underlying this appeal were summarized in our prior decision, *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d

613 (2018). However, because we now address post-judgment motions that were entered after that decision, a brief recitation of the factual and procedural history is warranted.

1. The Direct Condemnation Action and Installation of the Sewer Pipe

¶ 5 Ms. Rubin owns a tract of land in rural Wake County. In 2012 and 2013, a local real estate developer, Brad Zadell ("Mr. Zadell"), purchased several parcels to the east and west of Ms. Rubin's land with the intention of improving and selling them for residential development. *Rubin*, 262 N.C. App. at 149, 821 S.E.2d at 614. The western tract, known as Arcadia West, received sewer service from the Town, while the eastern tract, Riley's Pond, had no such access. *Id.* Mr. Zadell asked Ms. Rubin if she would grant him an easement to connect Riley's Pond to the Town's sewer service. *Id.* Ms. Rubin declined. *Id.*

¶ 6 Undeterred, Mr. Zadell turned to the Town's utilities director, asking for the Town to take the sewer easement by eminent domain.[1] *Id.* In 2015, The Town and Mr. Zadell agreed that: (1) the Town would pursue a direct condemnation action to seize a sewer easement across Ms. Rubin's property; and (2) Mr. Zadell would cover any and all costs incurred by the Town in the exercise of its eminent domain powers. *Id.* at 150, 821 S.E.2d at 615. A few weeks after entering into the agreement, Mr. Zadell contracted to sell Riley's Pond at a $2.5 million profit. *Id.*

¶ 7 In March 2015, the Town council voted to pursue a direct condemnation action for a sewer line easement across Ms. Rubin's land. *Id.* It filed the direct condemnation action the following month and used its statutory "quick-take" powers[2] to obtain immediate title to a 40' easement running across Ms. Rubin's property for the installation and maintenance of sewer lines "above, in, on, over, above, [sic] under, through, and across" the easement area. Ms. Rubin timely filed an answer contesting the taking as illegal and unconstitutional, but she did not pursue any injunctive relief to restrain the Town from constructing the sewer line.

¶ 8 After Ms. Rubin filed her answer, and while her challenge to the condemnation action was pending, the Town installed a sewer line within

1. The Town is authorized by its charter to exercise the same eminent domain powers granted to the North Carolina Department of Transportation found in N.C. Gen. Stat. §§ 136-103, *et seq.* (2019).

2. Quick-take powers grant a condemnor "right to immediate possession" of the condemned property "[u]pon the filing of the complaint and the declaration of taking and deposit in court[.]" N.C. Gen. Stat. § 136-104.

the 40' easement. The trial court later resolved Ms. Rubin's challenge to the condemnation and entered a judgment (the "Judgment") concluding the taking was not for a public purpose, even though the sewer line would serve the Riley's Pond subdivision. The Judgment declared the Town's "claim to [Ms. Rubin's] property by Eminent Domain . . . null and void" and dismissed the direct condemnation action. The Judgment was left undisturbed following a lengthy series of post-judgment motions and appeals. *See id.* at 153, 821 S.E.2d at 616-17 (2018), *temp. stay dissolved*, *disc. rev. denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

2. Litigation Following the First Appeal

¶ 9 After this Court's decision in the prior appeal, Ms. Rubin filed a combined motion and petition for writ of mandamus asking the trial court to compel the Town to remove the sewer line. Ms. Rubin sought this relief under several theories, including: (1) N.C. Gen. Stat. § 136-114 (2019), which gives trial courts in direct condemnation actions "the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter[;]" (2) N.C. Gen. Stat. § 1-302 (2019) and Rule 70 of the North Carolina Rules of Civil Procedure, which collectively authorize trial courts to compel a party to comply with a judgment directing the conveyance of land; (3) by writ of mandamus to compel the Town to perform the act of removing the pipes; and (4) through the trial court's inherent powers to enforce its own orders.[3]

¶ 10 The Town responded to Ms. Rubin's motion in two ways. First, it filed a motion for relief in the direct condemnation action on the basis that the Judgment voided the action *ab initio*, extinguished the trial court's jurisdiction, and rendered the installation of the sewer line a separate inverse condemnation. Second, the Town filed a new declaratory judgment lawsuit seeking to declare the sewer pipe installation an easement by inverse condemnation, limit Ms. Rubin's relief to that singular remedy, and enjoin her from removing the sewer line.

¶ 11 The trial court heard motions in the two actions jointly and ruled for the Town in each. In the direct condemnation action, the trial court denied Ms. Rubin's motion to enforce the Judgment, denied Ms. Rubin's petition for writ of mandamus, and granted the Town's motion for relief from the Judgment. In the declaratory judgment action, the trial court denied a motion to dismiss filed by Ms. Rubin and entered a preliminary

3. Ms. Rubin's motion asserted additional bases for injunctive relief. We do not address those additional bases because Ms. Rubin has not argued them in her briefs on appeal. *See* N.C. R. App. P. 28(a) (2021) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

injunction prohibiting Ms. Rubin from disturbing the sewer line. This decision addresses only the direct condemnation action.[4]

3. The Order Denying Ms. Rubin Injunctive Relief

¶ 12 In the first of two orders in the direct condemnation action, the trial court denied Ms. Rubin's motion for injunctive relief, based in part on the following facts:

> 4. [Ms. Rubin] did not plead any claim for relief entitling her to the relief requested in the Motion. [Ms. Rubin] could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. [Ms. Rubin] did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction . . . and did not request injunctive relief to close or remove the sewer pipe at the all other issues hearing before the Court.
>
> 5. Although the sewer pipe had been installed for approximately one year prior to the all issues hearing . . . the Judgment does not address the actual installation, maintenance and use of the sewer pipe under [Ms. Rubin]'s property and does not require removal
>
> . . . .
>
> 11. On or about 27 July 2015 the Town constructed an underground sewer line 18 feet under the entire width of a narrow portion of Rubin's property.
>
> . . . .
>
> 14. The sewer line was installed prior to the entry of the Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision . . . .

¶ 13 The trial court also made several findings and conclusions of law[5] interpreting the effect of the Judgment:

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4. The declaratory judgment action is discussed in greater detail in *Town of Apex v. Rubin*, No. COA20-305, 277 N.C. App. 357, 2021-NCCOA-188 (filed 4 May 2021), filed contemporaneously with this opinion.

5. The parties dispute whether the trial court's interpretation of the Judgment is a question of law or fact. Determinations as to the "legal effect of [an] order" are conclusions

> 2. The Judgment does not order the town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.
>
> 3. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

The trial court also entered conclusions of law rejecting Ms. Rubin's arguments for injunctive relief and concluding that the Town had taken an easement by inverse condemnation:

> 1. The Judgment does not afford to [Ms. Rubin] any of the relief which she seeks in the Motion. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).
>
> . . . .
>
> 7. A writ of mandamus is inappropriate because [Ms. Rubin] has failed to show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it. Mandamus is appropriate to compel the performance of a ministerial act but not to establish a legal right. *Meares v. Town of Beaufort*, 193 N.C. App. 49, 667 S.E.2d 224 (2008); *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E.2d 752, 753 (1938).
>
> 8. The Court has the inherent authority to enforce its own orders. However, the Court is not authorized and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that [Ms. Rubin] did not request or

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of law, which we review *de novo*. *Delozier v. Bird*, 125 N.C. 493, 34 S.E.2d 643, 643 (1899); *see also N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) ("[C]onclusions of law are reviewed de novo." (citation omitted)). To the extent the trial court's particular interpretations require application of legal principles to the facts, they are mixed questions of law and fact. *See, e.g.*, *Brown v. Charlotte-Mecklenburg Bd. of Ed.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967) (holding mixed questions of law and fact arise when "[t]he determination . . . requires an application of principles of law to the determination of facts"). We are not bound by the labels given these determinations by the trial court in conducting our analysis. *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011). The standards of review we apply to specific aspects of the trial court's orders are discussed below in the Analysis Section of this opinion.

plead. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

9. Regardless of the Court's authority, the Court does not read the Judgment the way [Ms. Rubin] suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. [Ms. Rubin] could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property but she did not do so. The Court will not now require the Town to remove the sewer line.

. . . .

11. Given the Court's dismissal of the condemnation complaint as null and void, the installation of the underground sewer line by the Town on 27 July 2015 was a taking of [Ms. Rubin]'s property by the Town that was not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement. . . .

13. [Ms. Rubin]'s allegations that the condemnation complaint resulted in a constitutional violation and [Ms. Rubin]'s comments about fairness do not support or provide a basis for the granting of the Motion. Further, the Supreme Court in [*Wilkie v. City of Boiling Springs*, 370 N.C. 540, 809 S.E.2d 853 (2018)], in spite of addressing constitutional issues with condemnations, held that a landowner has a claim for just compensation regardless of whether a taking is for a public or private purpose. The Supreme Court did not state that the landowner had a claim for permanent injunctive relief. Where there is an adequate remedy at law, injunctive relief, which is what [Ms. Rubin] seeks, will not be granted.

14. [Ms. Rubin] has an adequate remedy at law—i.e. compensation for inverse condemnation. . . . The Town's pending declaratory judgment action . . . provides [Ms. Rubin] an avenue to pursue her remedy at law for the inverse condemnation of the sewer easement—compensation.

> 15. As such, the Court declines to enforce the Judgment as [Ms. Rubin] requests and declines to issue a writ of mandamus.

4. The Order Granting Relief from Judgment

¶ 14 The trial court's second order in the direct condemnation action granted the Town's motion for relief from the Judgment. In that order, the trial court made findings of fact and conclusions of law consistent with several of those made in the order denying Ms. Rubin's motion to enforce the Judgment, including conclusions that an inverse condemnation had occurred and Ms. Rubin's only avenue for relief was an inverse condemnation claim for money damages. The second order added several conclusions of law explaining why the Town was entitled to relief from the Judgment:

> 3. It is just and equitable to allow the Town relief from the prospective application of the Judgment as it relates to the underground sewer pipe and corresponding easement.
>
> 4. [Ms. Rubin's] failure to seek and obtain injunctive relief prior to the construction of the sewer pipe and the Town's acquisition of the sewer easement by inverse condemnation renders the Judgment moot as to the installation of the sewer pipe and corresponding easement. . . .
>
> 5. The Judgment's dismissal of the condemnation proceeding had no effect on the rights inversely taken. . . .
>
> 6. At the time of entry of the Judgment, the question of whether the Town had the authority to condemn the sewer easement described in the original condemnation action was moot—specifically as to the installation of the sewer pipe and inversely condemned easement.
>
> 7. Since the Judgment against the Town is moot, the Court grants the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding easement on [Ms. Rubin's] property.

8. The Judgment is void as it relates to the installed sewer pipe and corresponding easement because the trial court did not have jurisdiction over [these] issues at the time of the entry of the Judgment. The issue of whether the Town could maintain a sewer line across [Ms. Rubin's] property no longer existed at the time that Judgment was entered. [Ms. Rubin] did not seek an injunction prior to construction and the Town had already constructed the sewer easement. . . .

9. Further the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded [Ms. Rubin's] property to construct a public sewer line on 27 July 2015 without a condemnation action—which under North Carolina law is an inverse taking.

10. Prior to the entry of the Judgment on 18 October 2016, the Town had already inversely taken and owned the sewer easement across [Ms. Rubin's] property on 27 July 2015. Since the sewer easement had been inversely taken prior to the entry of the Judgment, the court lacked subject matter jurisdiction to enter the Judgment to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement.

11. The absence of jurisdiction means the Judgment is void. A void judgment is a legal nullity. . . .

12. Since the Judgment against the Town is void as to [Ms. Rubin's] challenge to the installed sewer pine and corresponding easement, the Town should be granted the prospective relief from the Judgment pursuant to Rule 60(b)(4).

13. In addition, the Town is given prospective relief from the judgment pursuant to Rule 60(b)(6), as Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. . . .

14. In the Judgment, the Court stated that the paramount reason for the taking of the sewer easement

> described in the complaint was for a private purpose and the public's interest was merely incidental. However, prior to entry of judgment, the Town had already constructed the sewer pipe and acquired the sewer easement by inverse condemnation.
>
> 15. In 2018, the North Carolina Supreme Court reversed the Court of Appeals and ruled that public use or purpose is not an element of an inverse condemnation claim. . . . Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. . . .
>
> 16. As a result of the *Wilkie* decision from the Supreme Court, the legal basis for the Judgment no longer exists to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement. [Ms. Rubin] alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However, public purpose is not an element of inverse condemnation. Moreover, [the] Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment. All easement rights in the property transferred to the Town and were owned by it prior to entry of Judgment. Consequently, [the] Town should be granted relief from Judgment.

Ms. Rubin timely noticed an appeal from both orders. Following oral argument, both parties filed supplemental briefs with this Court.[6]

II. ANALYSIS

¶ 15 Ms. Rubin argues the trial court erred in concluding: (1) the installation of the pipe resulted in an inverse condemnation; (2) the inverse condemnation rendered the Judgment moot and void; (3) injunctive relief, either in the form of a writ of mandamus or otherwise, was unavailable to enforce the Judgment; and (4) inverse condemnation is the only

6. Ms. Rubin submitted her supplemental arguments through a motion for leave to submit a supplemental response, and the Town provided its additional briefing in its response to Ms. Rubin's motion. We allow Ms. Rubin's motion and consider these supplemental materials submitted by the parties.

available remedy for the Town's constitutional violation. We address the applicable standard of review before addressing each argument in turn.

1. Standard of Review

¶ 16 Findings of fact, when left unchallenged on appeal or supported by competent record evidence, are binding on this Court. *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011). Conclusions of law are generally reviewable de novo, *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 180, 695 S.E.2d 429, 435 (2010), and mixed questions of law and fact are fully reviewable on appeal, *Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016). However, when the trial court reaches a legal conclusion on whether to exercise its discretionary inherent authority, "we need determine only whether they are the result of a reasoned decision." *Sisk*, 364 N.C. at 435, 695 S.E.2d at 180 (citations omitted); *see also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) ("The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion." (citation omitted)). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion," *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted), and "the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require," *State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972) (citations omitted).

2. Installation of the Pipe Did Not Vest the Town with Title as a Matter of Law

¶ 17 In both orders, the trial court concluded that the installation of the pipe resulted in an inverse condemnation of a sewer easement on Ms. Rubin's property independent of the direct condemnation action. We agree with Ms. Rubin that the trial court erred in this respect.

¶ 18 Our Supreme Court has recently described inverse condemnations as follows:

> "Inverse condemnation" is a term often used to designate a cause of action *against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, *even though no formal exercise of the power of eminent domain has been attempted by the taking agency*.

*Wilkie v. City of Boiling Spring Lake*s, 370 N.C. 540, 552, 809 S.E.2d 853, 861 (2018) (cleaned up) (emphasis added).[7] This general description accords with the right of action afforded to landowners by statute. N.C. Gen. Stat. § 136-111 authorizes inverse condemnation suits by landowners against the Department of Transportation when "land or a compensable interest therein has been taken by . . . the Department of Transportation and no complaint and declaration of taking has been filed." So inverse condemnation is a claim assertable *by landowners* against a government entity "which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970) (quotation marks and citation omitted).

¶ 19 Although caselaw uniformly establishes that inverse condemnation claims inure in favor of landowners against government entities that have declined to pursue direct condemnation, the Town maintains that its installation of the sewer pipe—and subsequent defeat in the direct condemnation action—mean that the Town can compel a determination—against Ms. Rubin's express interest—that it took title to a sewer easement by inverse condemnation. The Town specifically asserts that: (1) the Judgment dismissing the condemnation action voided the condemnation *ab initio*; and (2) the installation of the sewer pipe therefore amounted to a separate intrusion vesting title in the Town through inverse condemnation. The Town's argument is not supported by the facts or the law.

¶ 20 Upon filing its direct condemnation action, the Town took legal title to a 40'-wide sewer easement across Ms. Rubin's property through a statutory "quick take" provision. N.C. Gen. Stat. § 136-104 provides that title to property, "together with the right to immediate possession" of the land, vests in the condemnor upon the filing of its complaint, the declaration of taking, and deposit of a bond with the trial court. Title to the easement at issue in this case included the right "to construct . . . a system of . . . pipes . . . under, through, and across" the easement area.

¶ 21 The Town entered onto Ms. Rubin's property and installed a sewer line within the 40' strip under the rights granted to it by the easement

7. Consistent with our Supreme Court's current practice, *see, e.g.*, *In re G.G.M.*, 377 N.C. 29, 37, 2021-NCSC-25, ¶ 22 (2021), we use the parenthetical "(cleaned up)" to denote removal of extraneous punctuation and citations without alteration of the quoted passage's meaning. *See generally Jack Metzler*, *Cleaning Up Quotations*, 18 J. Appellate Prac. & Process 143 (2017) (discussing the use and purposes of the "cleaned up" parenthetical).

obtained at the outset of the direct condemnation action.[8] That the Judgment would later decree the Town's "claim to [Ms. Rubin]'s property by Eminent Domain . . . null and void" does not obviate, as a factual matter, that the Town installed the pipe under the "quick take" title granted to the Town in the direct condemnation action.

¶ 22 As for whether the installation of the sewer pipe and the Judgment's decree vested the Town with title by inverse condemnation as a matter of law, two pertinent cases, *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), and *Town of Midland v. Morris*, 209 N.C. App. 208, 704 S.E.2d 329 (2011), preclude a holding in favor of the Town on this issue.

¶ 23 In *Thornton*, the North Carolina State Highway Commission (the "Commission") filed a direct condemnation action to construct a roadway across land belonging to the Thorntons. 271 N.C. at 229, 156 S.E.2d at 250. The Commission began construction five days after filing its action and, by the time the Thorntons filed their answer challenging the taking as for a non-public purpose, construction was 96 percent complete. *Id.* at 230, 156 S.E.2d at 251. The matter proceeded to trial after the road was entirely finished, and the trial court entered a judgment in favor of the Thorntons declaring the taking as not for a public purpose. *Id.* at 231-32, 156 S.E.2d at 251-52. On appeal to the Supreme Court, the Commission contended that the construction of the road precluded the Thorntons from protesting the taking. *Id.* at 237, 156 S.E.2d at 256. Though the Supreme Court ultimately reversed the trial court and upheld the taking as for a public purpose, it did so only after rejecting this argument by the Commission:

> Even if the Commission now finds itself embarrassed by its having constructed the road prematurely, upon its own assumption that the defendants would not assert a defense which the [direct condemnation] statute authorizes (i.e., the Commission's lack of power to condemn the land), the Commission may not assert such embarrassment as a bar to this right of the defendants. *The Commission may not, by precipitate entry and construction, enlarge its own powers of condemnation* . . . .

8. Indeed, the record includes an affidavit from the Town's assistant manager and former utilities director stating that the direct condemnation action conveyed title to the 40' easement for completion of a "Gravity Sewer Project" and that the Gravity Sewer Project was completed through installation of the sewer pipe at issue here.

Id. (emphasis added). The Supreme Court also plainly held that the Thorntons were "not estopped to assert that the land in question still belongs to them, *free of any right of way across it*[,]" *id.* at 238, 136 S.E.2d at 257 (emphasis added), and, in the event they prevailed, could assert "whatever rights they may have against those who have trespassed upon their land and propose to continue to do so." *Id.* at 240, 156 S.E.2d at 258. *Thornton* establishes that completion of a project subject to a direct condemnation action does not preclude a return of title—free and clear of any interest held by the State—to the prevailing landowner.

¶ 24 This Court reached a similar result in *Midland*, when the Town of Midland filed a direct condemnation action to construct a natural gas pipeline across private property. *Midland*, 209 N.C. App. at 211-13, 704 S.E.2d at 333-34. The private landowners argued the pipeline was not for a public purpose and moved for a preliminary injunction. *Id.* at 213, 704 S.E.2d at 334. The trial court denied the motion for a preliminary injunction and granted summary judgment for Midland. *Id.* Pending the property owners' appeal to this Court, Midland completed the pipeline and argued that the appeal was moot because construction was complete. *Id.* We disagreed, holding that "if this Court finds in their favor, [the] [p]roperty [o]wners will be entitled to relief . . . in the form of return of title to the land." *Id.* at 213-14, 704 S.E.2d at 334 (citing *Thornton*, 271 N.C. at 241, 156 S.E.2d at 259) (additional citations omitted). We further explained:

> We are wholly unpersuaded by Midland's argument that, even where a city flagrantly violates the statutes governing eminent domain, that city can obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment on the validity of condemnation is rendered.

Id. at 214, 704 S.E.2d at 335.

¶ 25 Both *Thornton* and *Midland* establish that a government body cannot take title to private property for a non-public purpose simply by filing a direct condemnation action and completing the construction project. In this case, the Town's position that it took title to a sewer easement by inverse condemnation through construction of the sewer pipe during the pendency of the direct condemnation action is irreconcilable with *Thornton*'s prohibition against the enlargement of the government's condemnation powers "by precipitate entry and construction." 271 N.C. at 237, 156 S.E.2d at 256. It also conflicts with this Court's holding in *Midland* that title reverts to the landowner after a successful challenge

to a condemnation action irrespective of whether the project was completed, as a "city [cannot] obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment . . . ." 209 N.C. App. at 214, 704 S.E.2d at 335. We therefore hold the trial court erred in its conclusions of law, found throughout both orders, establishing that the Town took an easement by inverse condemnation when it completed the installation of the sewer pipe across Ms. Rubin's property.

¶ 26 We are also unpersuaded by the Town's argument that *Wilkie* supports the trial court's conclusions to the contrary. That decision is distinguishable for at least three reasons. First, *Wilkie* involved an inverse condemnation claim *brought by the landowners*, *i.e.*, the parties with the right to bring an inverse condemnation claim against the government. 370 N.C. at 552, 809 S.E.2d at 861-62; *see also* N.C. Gen. Stat. § 136-111 (2019) (authorizing a party "whose land . . . has been taken" to file a statutory inverse condemnation claim); *Ferrell v. Dep't of Transp.*, 104 N.C. App. 42, 46, 407 S.E.2d 601, 604 (1991) (observing that "*property owners* have a constitutional right to just compensation for takings" (citation omitted) (emphasis added)). Second, *Wilkie* did not involve the completion of a project subject to a disputed direct condemnation, as occurred in both *Thornton* and *Midland*. Lastly, though *Wilkie* held that *landowners* do not need to show that the taking was for a public purpose to prevail on an inverse condemnation claim, it did so in part because the public purpose requirement serves as a shield to protect the landowner from government intrusion rather than as a sword to cut away private property rights. 370 N.C. at 552-53, 809 S.E.2d at 862. To adopt the Town's interpretation of *Wilkie* would weaponize that decision and deprive private property owners of the public purpose protection. This we will not do.

¶ 27 The Town's theory of the law would also open the door to numerous constitutional harms. For example, under the Town's theory, a municipality could pursue a direct condemnation action to pave a landowner's gravel driveway for no public purpose whatsoever, even if the landowner, in the exercise of his private property rights and out of a personal preference for gravel, had never sought to increase the value of his lot by paving the driveway. Then suppose, akin to *Thornton*, the municipality paved the landowner's driveway before the landowner filed an answer. If the municipality voluntarily dismissed its condemnation action or lost on the merits at trial, the theory that inverse condemnation damages were the property owner's sole remedy would preclude relief for the municipality's flagrant violation of the landowner's constitutional rights, as an inverse condemnation action must show both an intrusion *and*

"that the interference caused a decrease in the fair market value of [the property owner's] land as a whole." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 856, 786 S.E.2d 919, 926 (2016). We do not believe the law of inverse condemnation can be used to facilitate such an abuse of the government's eminent domain power.

3. The Judgment Is Not Moot

¶ 28 We further hold that the trial court erred in concluding the Judgment is moot. The trial court reached this conclusion in part on the basis that the Town took title to the easement by inverse condemnation. As explained *supra*, we hold that no such permanent vesting of title in the Town has occurred. If the completion of the pipeline in *Midland* did not preclude a return of title upon a final determination that the direct condemnation was not pursued for a public purpose, 209 N.C. App. at 213-14, 704 S.E.2d at 334, the Town's completion of the sewer line cannot moot Ms. Rubin's judgment to that effect.

4. The Judgment is Not Void

¶ 29 The trial court also erred in concluding that the Judgment was void "as it relates to the installed sewer pipe and corresponding easement because the trial court did not have jurisdiction over these[] issues at the time of the entry of the Judgment." The trial court premised this legal conclusion on its erroneous conclusion that an inverse condemnation had already occurred. As we have explained, the Town's direct condemnation action and installation of the sewer pipe did not automatically vest it with title to an easement by inverse condemnation after the trial court determined that the taking was not for a public purpose, and Ms. Rubin is entitled to pursue relief despite completion of the project. *See Thornton*, 271 N.C. at 238, 156 S.E.2d at 257; *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334.

¶ 30 During the direct condemnation action, The Town maintained that it had installed the pipe pursuant to the easement obtained through its "quick take" powers. The trial court, in resolving the dispute raised by the direct condemnation complaint and Ms. Rubin's answer contesting it, therefore had jurisdiction to determine whether the easement taken by the Town constituted a lawful taking for a public purpose irrespective of the installation of the sewer pipe. The Judgment's resolution of that issue in favor of Ms. Rubin and against the Town did not divest the trial court of jurisdiction to enforce the judgment. *See, e.g.*, *Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984) ("It is . . . true that while a court loses jurisdiction over a cause after it renders a final decree, it retains jurisdiction to correct or enforce its judgment." (cita-

tions omitted)). We hold that the Judgment, contrary to the Town's claim that it "is void as to Rubin's ability to contest the installed sewer line and corresponding easement," was not rendered void in any respect by the installation of the sewer line. As our Supreme Court held in *Thornton*, Ms. Rubin is "not estopped to assert that the land in question still belongs to [her], free of any right of way across it," 271 N.C. at 238, 156 S.E.2d at 257, and she may seek to vindicate "whatever rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so," *id.* at 240, 156 S.E.2d at 258, despite the sewer pipe's construction.

¶ 31 Because the Judgment was neither moot nor void and the Town has not taken title by inverse condemnation, we reverse the trial court's order granting the Town relief from the Judgment.

5. The Effect of the Judgment

¶ 32 We next address what effect the Judgment has and whether it affords Ms. Rubin a right to obtain previously unpled mandatory injunctive relief as a matter of law. We hold, following *Thornton* and *Midtown*, that the Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and divesting the Town of any legal title or lawful claim to encroach on it. *See Thornton*, 271 N.C. at 238, 156 S.E.2d at 257 ("The [Thorntons] are not estopped to assert that the land in question still belongs to them, free of any right of way across it."); *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334 ("[I]f this Court finds in their favor, [the] [p]roperty [o]wners will be entitled to relief . . . in the form of return of title to the land.").

¶ 33 But because Ms. Rubin did not seek mandatory injunctive relief in the direct condemnation action, she is not entitled to that remedy by the plain language of the Judgment. *See Wildcatt*, 69 N.C. App. at 11, 316 S.E.2d at 877 (holding that a trial court's jurisdiction after final judgment is generally limited to enforcing the judgment). Ms. Rubin's answer and defense in the direct condemnation action asserted that the Town's taking of a 40' easement to construct a sewer line was beyond the constitutional exercise of the Town's eminent domain powers. The trial court agreed, concluded that the taking was unconstitutional, and rendered its Judgment declaring null and void both the direct condemnation action and the Town's "quick take" title to the easement. The Judgment, given the issues raised before the trial court, did nothing more than that.

¶ 34 We acknowledge that mandatory injunctive relief is available as an ancillary remedy to an action resolving title to land. *See English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 13, 254 S.E.2d 223, 234

(1979). But a mandatory injunction is available as ancillary relief only if it has been requested while the principal action is pending. *See Jackson v. Jernigan*, 216 N.C. 401, 403-04, 5 S.E.2d 143, 145 (1939) (noting mandatory injunctive relief is available as an ancillary remedy to a continuing trespass in an action resolving title "to protect the subject of the action against destruction or wrongful injury *until the legal controversy has been settled*" but it is unavailable "when it is not in protection of some right *being litigated*" (emphasis added)). Ms. Rubin failed to seek a mandatory injunction while the direct condemnation action was pending. Mandatory injunctive relief falls outside the scope of the Judgment. For this reason, the trial court did not abuse its discretion in declining to exercise its inherent authority to enforce the Judgment in the manner Ms. Rubin requested.

¶ 35 Ms. Rubin asserts *Thornton* held that dismissal of a direct condemnation action is equivalent to a mandatory injunction requiring restoration of the property to its former condition. She misreads *Thornton*. There, as previously discussed, the Commission condemned the Thorntons' land; though they protested the action by asserting it was not for a public purpose, they did not seek to enjoin construction. 271 N.C. at 229-31, 156 S.E.2d at 250-52. After the road was complete, the trial court ruled that the condemnation was not for a public purpose and entered a judgment "permanently restraining [the Commission] (and enjoin[ing] [it]) from proceeding with the condemnation and appropriation of [the Thorntons'] lands." *Id.* at 235, 156 S.E.2d at 255 (quotation marks omitted). Our Supreme Court struck down the trial court's judgment. *Id.* at 236, 156 S.E.2d at 255. The Court drew a line between injunctive relief to halt *construction* and injunctive relief to halt a condemnation *proceeding*:

> An injunction against the institution or maintenance of condemnation proceedings, as distinguished from an injunction to restrain construction, is not proper[l]y issued, however, where the ground asserted therefor is one which the landowner may assert as a defense in the condemnation proceeding itself, for, in that event, the landowner has an adequate remedy at law.

Id. (citation omitted). The Supreme Court held that because the Thorntons' defense would mandate dismissal of the direct condemnation proceeding, an injunction prohibiting the proceeding from continuing would be redundant. *Id. Thornton* establishes that it is unnecessary to enjoin a proceeding that has been extinguished by dismissal; *Thornton*

does not hold that dismissal of a condemnation action is equivalent to a mandatory injunction to undo the construction and restore the land.

¶ 36 Ms. Rubin further cites prior decisions from this Court, as well as from other jurisdictions, to support her assertion that the Judgment directly affords mandatory injunctive relief requiring the Town to remove the sewer pipe irrespective of her failure to raise the issue in the direct condemnation action. None of the cases she cites—with one exception—addresses whether construction completed by the condemnor during the pendency of the direct condemnation action must be removed if the contesting landowner prevails. *See, e.g.*, *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334 (holding a prevailing landowner in a direct condemnation action is "entitled to relief . . . in the form of return of *title* to the land" (emphasis added)); *In re Rapp*, 621 N.W.2d 781, 784 (Minn. 2001) (holding that a prevailing landowner is entitled to "relief in the form of the return of his property" notwithstanding the government's completion of construction).

¶ 37 In the one North Carolina decision Ms. Rubin cites in which the trial court issued a mandatory injunction in a direct condemnation action, the landowners requested that remedy by counterclaim during the pendency of the action and the injunction was not challenged on appeal. *City of Statesville v. Roth*, 77 N.C. App. 803, 805-06, 336 S.E.2d 142, 143 (1985). As explained below, our Supreme Court has more recently held that such injunctive relief is generally not available against the State. *See Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 485-86, 342 S.E.2d 832, 838 (1986) (holding injunctive relief was unavailable against the Department of Transportation for an occupation of private property that was not for a public purpose).

¶ 38 We also are unpersuaded by Ms. Rubin's reliance on N.C. Gen. Stat. §§ 40A-12, 1-302, and Rule 70 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 40A-12 provides that "[w]here the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure . . . , the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter." Here, Ms. Rubin seeks more than just a procedural ruling; she seeks the additional substantive right to compel removal of the Town's sewer pipe by order of the trial court. As we have explained, mandatory injunctive relief is ancillary to—and thus exceeds—the ordinary relief afforded by a judgment resolving a dispute as to title. *See English*, 41 N.C. App. at 13, 254

S.E.2d at 234 (noting mandatory injunctive relief is ancillary to an action seeking to resolve disputes of title and possession of land).

¶ 39 N.C. Gen. Stat. § 1-302 allows enforcement of "a judgment [that] requires . . . the delivery of real . . . property" and Rule 70 allows a trial court to order the conveyance of title "[i]f a judgment directs a party to execute a conveyance of land[.]" The Judgment in this case does neither. It simply restores title to Ms. Rubin. With title in hand, she is left to pursue the "rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so." *Thornton*, 271 N.C. at 240, 156 S.E.2d at 258.

¶ 40 Ms. Rubin further proposes, relying on *Thornton*, that the Judgment as a matter of law established her right to eject the Town by writ of mandamus. While mandatory injunctive relief may be available to her through a trespass claim for the Town's continuing encroachment, the Judgment does not provide that relief. A mandatory injunction is available only after "consider[ation] [of] the relative convenience-inconvenience and the comparative injuries to the parties." *Clark*, 316 N.C. at 488, 342 S.E.2d at 839 (citation omitted).[9] This Court has described that balancing test as follows:

> Factors to be considered are whether the [trespassing] owner acted in good faith or intentionally built on the [injured party's] land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment. Mere inconvenience and expense are not sufficient to withhold injunctive relief. The relative hardship must be disproportionate.

Williams, 82 N.C. App. at 384, 346 S.E.2d at 669 (citing Dobbs, Remedies, § 5.6 (1973)). If Ms. Rubin establishes the Town's trespass and its liability therefor, the trial court may grant mandatory injunctive relief only after weighing the equities as set forth above. *See Clark*, 316 N.C. at 488, 342 S.E.2d at 839.

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9. This is in contrast to encroachment actions between private landowners; because neither party possesses the right to private eminent domain, the trespasser cannot be compelled to buy the land she has unlawfully built upon and the injured landowner cannot be compelled to sell the property encumbered by the encroachment. In such a circumstance, mandatory injunctive relief to destroy the encroachment is the only relief available and will be awarded as a matter of law. *Williams v. South & South Rentals, Inc.*, 82 N.C. App. 378, 384, 346 S.E.2d 665, 669 (1986).

¶ 41 Because a writ of mandamus is available only to enforce an established right, and the Judgment in this case did not establish the right Ms. Rubin seeks to enforce, she is not entitled to a writ of mandamus. See *Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964) ("The function of the writ is . . . not to establish a legal right . . . .").

6. Mandatory Injunctive Relief is Available by Separate Trespass Claim

¶ 42 The Judgment does not provide the Town an easement by inverse condemnation as a matter of law. Ms. Rubin cannot be compelled to surrender title to the Town. The Judgment also does not afford Ms. Rubin the mandatory injunctive relief she seeks. The question remains whether the trial court correctly concluded that the Judgment precluded mandatory injunctive relief. We hold that the trial court erred in this respect. While Ms. Rubin is not entitled to post-judgment mandatory injunctive relief in the direct condemnation action, she may bring a trespass claim against the Town in pursuit of the mandatory injunctive relief she seeks. We therefore vacate the trial court's orders insofar as they preclude the availability of mandatory injunctive relief, but we ultimately affirm the trial court's denial of Ms. Rubin's motion to enforce the Judgment.

a. Caselaw Regarding Remedies for Government Trespass

¶ 43 The proposition that a government body occupying private property outside its eminent domain powers is committing a trespass—and may be ejected for it—is not a new one. In *McDowell v. City of Asheville*, 112 N.C. 747, 17 S.E. 537 (1893), our Supreme Court held that a town committing such an act "may be treated as a trespasser and sued in ejectment." 112 N.C. at 750, 17 S.E. at 538. The aggrieved landowner may also, however, "elect [not] to treat the [town] as a trespasser . . . [and] compel the [town] to assess the damages as provided by its charter," *id.*, effectively compelling a payment of just compensation by inverse condemnation. *See, e.g.*, *Hoyle*, 276 N.C. at 302, 172 S.E.2d at 8. This framing of the encroaching town as a trespassing tortfeasor and the ability of the landowner to *elect* damages or ejectment is generally consistent with *Lloyd v. Venable*, 168 N.C. 531, 84 S.E. 855 (1915), in which a town that lacked any eminent domain powers built a street over private land. 168 N.C. at 534, 84 S.E. at 857. In holding the landowner's claim for damages could proceed, our Supreme Court held that the town's "entry . . . was . . . unlawful . . . [but] the plaintiff can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken." *Id.*

¶ 44 In the century since *McDowell* and *Lloyd*, our Supreme Court has limited monetary and injunctive relief available to private landowners following wrongful intrusion by the government.

¶ 45 In *State Highway Comm'n v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965), the Commission, on behalf of the State, filed a condemnation action to pursue construction of a road across privately owned land and, in preparation for construction, cut down several trees on the property. 265 N.C. at 348, 144 S.E.2d at 127. The private landowners challenged whether the condemnation was for a public purpose and counterclaimed for damages to recover the value of the trees cut down by the Commission's employees. *Id.*, 144 S.E.2d at 128. The trial court initially entered a preliminary injunction barring construction but ultimately concluded the condemnation was for a public purpose. *Id.* at 349-50, 144 S.E.2d at 129. On appeal, the Supreme Court held that the condemnation was not for a public purpose and reversed the trial court's judgment. *Id.* at 360-61, 144 S.E.2d at 137. It also held, however, that the Commission could not be held liable for having cut down the trees:

> [The private landowners] alleged that the construction of [the] highway is beyond the scope of the [eminent domain] authority vested in the Commission and inferentially that acts done in furtherance thereof are also unauthorized. We have agreed. Therefore, the cutting of the trees was not a taking of private property for public use. It was merely an *unauthorized trespass by employees of the Commission, for which no cause of action exists against the Commission in favor of [the private landowners]*. . . . An agency of the State is powerless to exceed the authority conferred upon it, *and therefore cannot commit an actionable wrong.*

Id. at 361, 144 S.E.2d at 137-38 (citations omitted) (emphasis added). *Batts* did not address the availability of injunctive relief to bar government intrusion onto private property for a non-public purpose.

¶ 46 In *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986), our Supreme Court held that mandatory injunctive relief cannot be obtained against the State following its trespass on private land. 316 N.C. at 485, 342 S.E.2d at 838. There, a contractor building a highway near Asheville for the Department of Transportation ("DOT") dumped rock waste in a residential subdivision. 316 N.C. at 478-79, 342 S.E.2d at 834. The landowners sued DOT, the contractor, and the corporate

president of the contractor, seeking damages in tort, a mandatory injunction ordering the removal of the rock waste and, failing that, just compensation for the taking by DOT. *Id.* All defendants cross-claimed each other and filed motions to dismiss and for summary judgment; at the hearing on those motions, the landowners elected to forego their claims for monetary damages in favor of an "order that the [DOT] and the contractor remove the waste previously deposited on the property in question." *Id.* at 482, 342 S.E.2d at 836. The landowners moved for summary judgment, and DOT sought to dismiss all claims against it on the grounds that it was immune from suit. *Id.* at 482-83, 342 S.E.2d at 836. The trial court denied DOT's motions and, after hearing evidence, concluded that the dumping of waste was a taking for a non-public purpose. *Id.* It then ordered that the defendants, including DOT, "cease and desist, and eliminate the nonconforming use . . . and . . . remove all waste rock material placed on the property." *Id.* at 483, 342 S.E.2d at 836. DOT appealed.

¶ 47 The Supreme Court held that the trial court erred in denying summary judgment for DOT. *Id.* at 484, 342 S.E.2d at 837. No party challenged the trial court's determination that the waste disposal was not for a public purpose, so the Supreme Court took that conclusion as true. *Id.* It then held, citing both *Thornton* and *Batts*, that the landowners could not pursue their remedy against DOT for the unauthorized taking:

> As the acts the plaintiffs complain of were not for a public purpose, they were beyond the authority of DOT to take property for public use in the exercise of its statutory power of eminent domain. Since DOT as a matter of law is incapable of exceeding its authority, the acts complained of could not be a condemnation and taking of property *by DOT* or an actionable tort *by DOT*. At most, the acts complained of could have been unauthorized trespasses by agents of DOT, for which no actionable claim exists against DOT.

Id. at 485, 342 S.E.2d at 838 (citing *Thornton*, 271 N.C at 236, 156 S.E.2d at 255; *Batts*, 265 N.C. at 361, 144 S.E.2d at 137) (additional citations omitted). The Supreme Court held that DOT was immune to claims for both damages *and* injunctive relief: " ['The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute . . .). *It follows that he cannot maintain an action against it to restrain the commission of a tort.*'] " *Id.* at 486, 342 S.E.2d at 838 (quoting *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (emphasis added)).

Consistent with *Thornton* and *Batts*, the Supreme Court held that the aggrieved landowners had a valid cause of action against the individual public employees and officials responsible for the unauthorized taking:

> [T]he landowner is not without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State.

Id. (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188). The Supreme Court explained that "the acts of the defendants forming the basis of the claims by the plaintiffs . . . against DOT must be viewed as not having been a taking for a public use. Therefore, neither the plaintiffs nor the other defendants could maintain an action against DOT arising from those acts." *Id.*[10]

¶ 48 In sum, *Clark* holds that private landowners cannot seek mandatory injunctive relief against a State agency to restore property following an unauthorized encroachment for a non-public purpose. In such instances, it is the individual public officials and agents of the State who are personally liable for the illegal acts "invad[ing] the property rights of a citizen in disregard of law . . . even though they act or assume to act under the authority and pursuant to the directions of the State." *Id.* (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188).

b. Applying Precedent to This Case

¶ 49 *Batts* and *Clark* are distinguishable from this case because they concern the sovereign immunity of state *agencies* as opposed to *municipalities*.[11] Unlike the State, municipalities enjoy only limited

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10. Immunity from suit does not bar inverse condemnation claims filed by landowners pursuant to statutory provisions authorizing such actions. *See Wilkie*, 370 N.C. 540, 551 n.9, 809 S.E.2d 853, 861 n.9 (holding *Clark* has no bearing on a statutory inverse condemnation claim brought under N.C. Gen. Stat. § 40A-51 because the Court's decision in *Clark* did not discuss or reference the statute).

11. Although *Clark* and *Batts* do not explicitly label the immunity discussed in those decisions as sovereign immunity, the case law cited and rationale provided in those decisions are grounded in sovereign immunity law. For example, both *Clark* and *Batts* cite *Schloss v. State Highway & Public Works Comm'n*, 230 N.C. 489, 53 S.E.2d 517 (1949) for their holdings on immunity, and *Schloss* begins with the maxim "[t]hat the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established

governmental immunity that does not extend to propriety functions. *Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012).

¶ 50 A municipal sewer system that is supported by rates and fees is a propriety function not subject to governmental immunity. *See, e.g.*, *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006) ("The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for maintenance of sewer lines." (citations omitted)). The record in this case includes several sections from the Apex Town Code of Ordinances—submitted by the Town to the trial court—disclosing that the Town does charge rates and fees for its sewer service. On the record before us, we cannot conclude that the Town is immune to suit for trespassing.

¶ 51 We further distinguish *Batts* and *Clark* based on more recent precedents. Both of these decisions were decided years before our Supreme Court's landmark decision in *Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), which carved out an express exception to sovereign immunity for constitutional injuries. Under *Corum*, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782, 413 S.E.2d at 289. And, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Our Supreme Court has since made clear that *Corum* preserves constitutional claims arising out of tortious acts by the State that are otherwise barred by sovereign immunity. *See Craig ex rel. Craig v. New Hanover Cty Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009) ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.").

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principle of jurisprudence in all civilized nations." 230 N.C. at 491, 53 S.E.2d at 518 (citations omitted). Similarly, the legal fiction espoused in *Batts* and *Clark* that a State agency cannot commit a tortious act because it is unable to act outside its lawful authority is identical to the antiquated fiction that the "king can do no wrong" undergirding sovereign immunity. *See Epps v. Duke Univ.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) ("Sovereign immunity extends from feudal England's theory that the 'king can do no wrong.' " (citation omitted)).

¶ 52 The Town maintains on appeal, as it did before the trial court, that the only remedy available to Ms. Rubin is money damages for inverse condemnation. The Town relies on *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). In *McAdoo*, Greensboro widened a road onto private property, and the property owners sought damages for trespass and inverse condemnation. 91 N.C. App. at 570-71, 372 S.E.2d 742-43. We held that the landowners could not recover monetary damages for both trespass and inverse condemnation, as "[t]he exclusive remedy *for failure to compensate* for a 'taking' is inverse condemnation[,]" and the landowners therefore "ha[d] no common-law right to bring a trespass action against a city." *Id.* at 573, 372 S.E.2d at 744 (citing *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982)) (additional citation omitted) (emphasis added).

¶ 53 *McAdoo* is distinguishable for several reasons. Most obviously, that case did not involve a taking that was adjudicated to be unconstitutional and for a non-public purpose. And unlike the landowners in *McAdoo*, Ms. Rubin is not seeking to redress a "failure to compensate for a 'taking[,]' " *id.*, but has instead elected to pursue mandatory injunctive relief to remedy what was already determined to be an unconstitutional encroachment. *Cf. Clark*, 316 N.C. at 488, 342 S.E.2d at 839 (holding that private landowners had valid claims only against DOT's contractor where they had "*elected* to pursue only the remedy of injunctive relief" instead of claims for monetary damages, including inverse condemnation); *Lloyd*, 168 N.C. at 531, 84 S.E. at 857 (providing a landowner injured by an intrusion onto private property not within the power of eminent domain "can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken"); *McDowell*, 112 N.C. at 747, 17 S.E. at 538 ("[I]t may be true . . . that the [City of Asheville] . . . may be treated as a trespasser, and sued in ejectment, but it is clear that such a remedy would not be appropriate to the peculiar circumstances of this case. [City of Asheville] is still occupying the land as a street . . . and the plaintiffs evidently prefer that the street should remain, and therefore do not *elect* to treat [the City] as a trespasser." (citation omitted)); *Thornton*, 271 N.C. at 241, 156 S.E.2d at 258 (describing *Lloyd* and *McDowell* as holding "where there is a taking not within the power of eminent domain the landowner may *elect* to claim damages as if the taking had been lawful . . . .").

¶ 54 *McAdoo* held that a claim for damages in trespass did not lie because the applicable inverse condemnation statute, N.C. Gen. Stat. § 40A-51, was the exclusive remedy. 91 N.C. App. at 573, 372 S.E.2d at 744. But a different statute applies here, and the Town's actions compel a different

result. N.C. Gen. Stat. § 136-111 authorizes an inverse condemnation claim against a condemnor only when "no complaint and declaration of taking has been filed." Because the Town *did* file a complaint and declaration of taking to install the sewer pipe at issue, a statutory inverse condemnation claim was not available to Ms. Rubin.

¶ 55 We also disagree with the Town's argument, presented in supplemental materials filed with this Court, that monetary compensation through an inverse condemnation action is a proper and "adequate state remedy" under *Corum*. As our Supreme Court unequivocally held in *Thornton*, payment for an occupation of private land by the State for a non-public purpose does not remedy the constitutional injury:

> It is not a sufficient answer that the landowner will be paid the full value of his land. It is his and *he may not be compelled to accept its value in lieu of it unless it is taken from him for a public use*. To take his property without his consent for a non-public use, *even though he be paid its full value*, is a violation of Article I, s 17, of the Constitution of this State and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

271 N.C. at 241, 156 S.E.2d at 259.

¶ 56 We note that mandatory injunctive relief is not guaranteed by a successful claim for trespass against the Town. In *Clark*, our Supreme Court remanded the matter back down to the trial court for further findings of fact that "consider[ed] the relative convenience-inconvenience and the comparative injuries to the parties." 316 N.C. at 488, 342 S.E.2d at 839. This Court has since enumerated the factors to be considered in that balancing test. *Williams*, 82 N.C. App. at 384, 346 S.E.2d at 669. The Town may also have other defenses precluding relief and it "is entitled to all defenses that may arise upon the facts and law of the case." *Corum*, 330 N.C. at 786, 413 S.E.2d at 292.

¶ 57 We also do not agree with the Town's contention that Ms. Rubin's failure to raise mandatory injunctive relief in the direct condemnation action precludes her from pursuing it after entry of the Judgment. The mandatory injunctive relief sought was not, at the time Ms. Rubin filed her answer, a compulsory counterclaim barred by *res judicata*. *See*, *e.g.*, *Murillo v. Daly*, 169 N.C. App. 223, 227, 609 S.E.2d 478, 481 (2005) ("As the [plaintiffs'] claims were not compulsory counterclaims in the previous action, they are not now barred by the doctrine of *res judicata*."). Whether a counterclaim is mandatory under our Rules of Civil Procedure is deter-

mined based on its maturity at the time of pleading. *See, e.g.*, *Driggers v. Commercial Credit Corp.*, 31 N.C. App. 561, 564-65, 230 S.E.2d 201, 203 (1976) ("Where a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, matures or is acquired by a pleader after he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim. . . . [S]uch supplemental pleading is not mandated and failure to do so will not bar the claim." (citations omitted)).

¶ 58 Here, the Town was not a trespasser until: (1) it installed the sewer pipe *after* Ms. Rubin had filed her answer, and; (2) the Judgment extinguishing the Town's right, title, and interest in Ms. Rubin's land went into effect.[12] Furthermore, the sewer pipe represents a continuing trespass, "a peculiar animal in the law. . . . [E]ach day the trespass continues a new wrong is committed." *Bishop v. Reinhold*, 66 N.C. App. 379, 382, 311 S.E.2d 298, 300 (1984); *see also John L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 140 N.C. 437, 442, 53 S.E. 134, 136 (1906) (holding recovery for the continuing injury of a trespass action is not barred by *res judicata* unless the claimant failed to establish in the prior action "the unlawful entry, or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed").

¶ 59 As for Ms. Rubin's failure to raise mandatory injunctive relief in the "all other issues" hearing required by N.C. Gen. Stat. § 136-108, we note that our Supreme Court in *Thornton*, which involved a roadway completed during a direct condemnation action subject to an "all other issues" hearing under the same statute, held that the Thorntons, who never sought to enjoin construction, could continue to claim ownership "free of any right of way" and pursue relief "against those who have trespassed upon their land and propose to *continue to do so*" if they prevailed. 271 N.C. at 238, 240, 156 S.E.2d at 257, 258 (emphasis added).

¶ 60 Like the Thorntons—had they prevailed—Ms. Rubin is entitled to relief against the Town for its trespass following the trial court Judgment dismissing the condemnation action and the exhaustion of the Town's appeal rights. Given the nature of a continuing trespass, and *Thornton*'s holding on the continued availability of trespass actions, Ms. Rubin may seek injunctive relief for the continuing trespass that the Town refuses to abate. *Id.* at 240, 156 S.E.2d at 258.

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12. The Judgment was temporarily stayed by the Supreme Court in the course of the Town's appeals, and the stay was eventually dissolved on 27 March 2019. *Town of Apex v. Rubin*, 372 N.C. 107, 825 S.E.2d 253 (2019).

¶ 61 Finally, as noted by the parties at oral argument, this case presents a unique circumstance involving the continued use of a sewer line, installed pursuant to a direct condemnation action, that was determined to be for a non-public purpose and in violation of the landowner's constitutional rights. This case therefore differs significantly from those addressed by the inverse condemnation statutes N.C. Gen. Stat. §§ 136-111 and 40A-51, both of which apply when no condemnation action was filed by the government. We limit our holding to cases in which a municipality filed a direct condemnation action, constructed an improvement on the protesting landowner's property, and later lost the condemnation action on the ground that it was for a non-public purpose. We do not address instances in which a taking occurred without the filing of a direct condemnation action.

III. CONCLUSION

¶ 62 For the foregoing reasons, we vacate the provisions of the trial court's order denying Ms. Rubin's motion to enforce the Judgment that declared: (1) the Town took title to an easement by inverse condemnation; (2) the Judgment was moot; and (3) the Judgment was void. However, because the Judgment itself does not establish a right to mandatory injunctive relief and is instead available only through a separate claim against the Town upon a balancing of the equities, we affirm the trial court's denial of that relief. The trial court's order granting the Town relief from the Judgment is reversed.

VACATED IN PART; AFFIRMED IN PART; REVERSED IN PART.

Judges DILLON and JACKSON concur.

TOWN OF APEX v. RUBIN

[277 N.C. App. 357, 2021-NCCOA-188]

TOWN OF APEX, PLAINTIFF
v.
BEVERLY L. RUBIN, DEFENDANT

No. COA20-305

Filed 4 May 2021

1. Appeal and Error—interlocutory orders—substantial right—risk of inconsistent verdicts

In a condemnation matter in which a town filed a direct condemnation action and later filed a declaratory judgment action, interlocutory orders from the latter proceeding were immediately appealable as affecting a substantial right where both actions involved the same factual issues and there was a risk of inconsistent verdicts, and because the property owner asserted that the doctrine of res judicata prohibited re-litigating the issue of whether the town had title to an easement on her property.

2. Collateral Estoppel and Res Judicata—res judicata—prior direct condemnation proceeding—related declaratory judgment action—issue of title already determined

In a condemnation matter, a town was prevented in its declaratory judgment action by principles of res judicata from re-litigating the issue of whether it had title to an easement on a resident's property, after a determination was made in the direct condemnation action that the town's taking of an easement was improper and that its installation of a sewer line on the resident's property did not constitute an inverse condemnation. The parties, subject matter, and issues were the same in both actions.

3. Collateral Estoppel and Res Judicata—res judicata—prior direct condemnation proceeding—related declaratory judgment action—issues regarding remedy barred

In a condemnation matter, principles of res judicata prevented a town's claims in its declaratory judgment action regarding what remedy was available to a resident on whose property the town improperly installed a sewer line. Since a determination was made in the direct condemnation action that the town's taking of an easement was improper and that its installation of a sewer line on the resident's property did not constitute an inverse condemnation, the resident was not compelled to accept compensation and was free to pursue mandatory injunctive relief through a trespass claim.

4. Collateral Estoppel and Res Judicata—prior direct condemnation proceeding—related declaratory judgment action—new issues not barred—prior action pending doctrine inapplicable

In a condemnation matter in which it was determined that a town's taking of an easement was invalid and that the town's installation of a sewer line across a resident's property did not constitute an inverse condemnation, the town's new claims in its related declaratory judgment action (filed to prevent the resident from removing the sewer line)—including resolution of the parties' respective rights to the sewer line in light of various equitable doctrines—were not barred where they were not addressed in the prior direct condemnation proceeding. Moreover, these claims were not barred by the prior action pending doctrine, because there was no pending action regarding injunctive relief at the time the town filed the declaratory judgment action.

5. Injunctions—preliminary—condemnation matter—to prevent removal of improper sewer line—likelihood of success on merits

In a condemnation matter in which it was determined that a town's taking of an easement was invalid and that the town's installation of a sewer line across a resident's property did not constitute an inverse condemnation, and where the town was granted a preliminary injunction in its declaratory judgment action to prohibit the resident from removing the sewer line, based on principles of res judicata, there was no likelihood that the town would succeed on the merits of the parts of its claim related to title of the easement and what remedy was available to the resident. Further, the trial court's finding that there were no practical alternatives to the currently installed sewer line was not supported by the record. The Court of Appeals left the preliminary injunction undisturbed, however, since the resident did not rebut the presumption that the town was likely to succeed on the separate issue of whether removal of the pipe was warranted in light of various equitable principles.

Appeal by Defendant from orders entered 21 January 2020 by Judge G. Brian Collins in Wake County Superior Court. Heard in the Court of Appeals 24 February 2021.

Nexen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for Plaintiff-Appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton, and Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and B. Joan Davis, for Defendant-Appellant.

Johnston, Allison & Hord, P.A., by R. Susanne Todd and Maisha M. Blakeney, and Sever Storey, LLP, by Shiloh Daum, for amicus curiae North Carolina Advocates for Justice.

John Locke Foundation, by Jonathan D. Guze, amicus curiae.

INMAN, Judge.

¶ 1 This appeal arises from the same underlying facts at issue in *Town of Apex v. Rubin*, COA20-304, 277 N.C. App. 328, 2021-NCCOA-187 (filed 4 May 2021) (hereinafter "*Apex v. Rubin I*"), filed concurrently with this opinion. In that action, as here, Plaintiff-Appellee Town of Apex ("the Town") asserts title to a sewer line installed on Defendant-Appellant Beverly L. Rubin's ("Ms. Rubin") land for a non-public purpose, in excess of the Town's eminent domain powers, and in violation of Ms. Rubin's constitutional rights. Both cases involve the same facts and some of the same legal issues. *Apex v. Rubin I* arises from post-judgment orders in a direct condemnation action. This appeal arises from interlocutory orders in a separate declaratory judgment action filed by the Town to settle the parties' rights in the sewer line and prohibit Ms. Rubin from disturbing it after the Town's condemnation action was dismissed.

¶ 2 Ms. Rubin appeals from interlocutory orders denying her motion to dismiss the Town's declaratory judgment complaint and granting the Town's motion for a preliminary injunction. After careful review, we reverse in part and affirm in part the trial court's denial of Ms. Rubin's motion to dismiss. We vacate in part and affirm in part the preliminary injunction.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 Many of the facts underlying this appeal are discussed in *Apex v. Rubin I*. But because this appeal arises out of a separate action with its own unique procedural history, we will summarize facts pertinent to the issues before us here.

1. The Direct Condemnation Action, Appeal, Post-Judgment Motions, and The Town's Response

¶ 4 In 2015, the Town filed a direct condemnation action and, under its statutory "quick take" powers, assumed title to a sewer easement across

Ms. Rubin's property to connect a private residential development called Riley's Pond to the Town's sewer service. Ms. Rubin contested the direct condemnation action as for a non-public purpose but did not counterclaim for or otherwise pursue injunctive relief. While the direct condemnation was pending, the Town installed its sewer pipe on Ms. Rubin's property.

¶ 5 The trial court ultimately ruled in favor of Ms. Rubin, declared the taking was for an impermissible non-public purpose, and entered a judgment dismissing the Town's direct condemnation action in October 2016 ("the Judgment"). The Judgment was left undisturbed following a series of post-judgment motions and appeals by the Town. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 616-17 (2018), *temp. stay dissolved*, *disc. rev. denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

¶ 6 Having prevailed in the direct condemnation action, Ms. Rubin asked the Town to remove the sewer line. The Town refused, leading Ms. Rubin to file a combined motion to enforce the Judgment and petition for writ of mandamus to compel the Town to remove the sewer pipe.

¶ 7 The Town responded to Ms. Rubin's motion in two ways. First, in the direct condemnation action, it filed a motion for relief on the basis that the Judgment voided the action *ab initio*, extinguished the trial court's jurisdiction, and rendered the installation of the sewer line a separate inverse condemnation. Second, the Town filed a new declaratory judgment lawsuit—the subject of this appeal—seeking to declare the sewer pipe installation an easement by inverse condemnation, limit Ms. Rubin's relief to that singular remedy, and enjoin her from removing the sewer line.

2. The Declaratory Judgment Complaint and Ms. Rubin's Motion to Dismiss

¶ 8 The facts alleged in the Town's declaratory judgment complaint largely restate the procedural history of the direct condemnation action through the filing of Ms. Rubin's post-judgment motions. Based on those facts, the Town asserts it is entitled to judgment declaring:

> (1) . . . that the installation of the sewer line on 27 July 2015 was an inverse taking, (2) that inverse condemnation is Rubin's sole remedy for the installation of the sewer pipe on her property, (3) that the remedy of inverse condemnation is time barred, (4) that given the Town's limited waiver of its defense of the statute of limitations, Rubin is entitled to a jury trial on the issue of the amount of compensation due for the

> inverse taking described in this complaint, (5) that . . . relief be granted to order a jury trial to be held on the issue of the amount of compensation due for the inverse taking described in this complaint, (6) that . . . relief be granted to order the amount deposited by the Town that is being held by the Clerk of Superior Court for the benefit of Rubin be deemed to be the Town's deposit of its estimate of just compensation for the inverse taking described in this complaint, (7) that the judgment is *res judicata* as to any claims by Rubin for injunctive relief or an extraordinary writ, and/or should not be applied prospectively . . . , and (8) [that] the doctrines of laches, economic waste, and other similar equitable doctrines bar Defendant from causing the removal of the sewer pipe.

¶ 9 Ms. Rubin filed a motion to dismiss the Town's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that the complaint was barred by *res judicata* and the prior action pending doctrine based on the Judgment and her then-unresolved post-judgment motions.

3. The Orders Denying Ms. Rubin's Motion to Dismiss and Entering a Preliminary Injunction

¶ 10 The trial court heard motions in both the direct condemnation action and the declaratory judgment action jointly and ruled for the Town in each. In the direct condemnation action, the trial court denied Ms. Rubin's motion to enforce the Judgment, denied Ms. Rubin's petition for writ of mandamus, and granted the Town's motion for relief from the Judgment. We review those rulings in *Apex v. Rubin I*. In the declaratory judgment action, the trial court denied Ms. Rubin's motion to dismiss and entered a preliminary injunction prohibiting Ms. Rubin from disturbing the sewer line. This decision addresses only the declaratory judgment action.[1]

¶ 11 The trial court's order denying Ms. Rubin's motion to dismiss, consistent with ordinary practice, contains no findings of fact or conclusions

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1. The direct condemnation action is discussed in greater detail in *Apex v. Rubin I*. To the extent we discuss the contents of the record of *Apex v. Rubin I*, we take judicial notice of those documents. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) ("[A] court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.").

of law, and simply denies dismissal on the two grounds asserted by Ms. Rubin. In its preliminary injunction order, the trial court made findings of fact and conclusions of law establishing: (1) a dispute existed between the parties as to whether Ms. Rubin could disturb, destroy, or compel the Town to remove the sewer line; (2) an inverse condemnation had occurred as a result of the Town's installation of the sewer line and the subsequent dismissal of the direct condemnation action; (3) Ms. Rubin's sole remedy was an inverse condemnation claim; (4) removal of the sewer line would cause irreparable harm to the Town and the lots and/or homes served in Riley's Pond; (5) an injunction was necessary to protect the Town's rights and preserve the status quo during the course of litigation; (6) there are no practical alternatives available to the Town to serve Riley's Pond; and (7) the Town is likely to succeed on the merits of its claims for declaratory and injunctive relief.

¶ 12 Ms. Rubin noticed an appeal from both orders. The Town filed a motion to dismiss Ms. Rubin's appeal with this Court on 19 May 2020 on the ground that the orders below are interlocutory and do not affect a substantial right. Ms. Rubin then filed a conditional petition for writ of certiorari requesting review should this Court grant the Town's motion to dismiss.

II. ANALYSIS

¶ 13 Ms. Rubin broadly argues, as she does in *Apex v. Rubin I*, that the trial court's orders in this case stem from the erroneous conclusions that: (1) the Judgment does not grant her a right to mandatory injunctive relief to remove the pipe; and (2) the Town's installation of the pipe during the pendency of the direct condemnation action, absent any effort by Ms. Rubin to enjoin that installation, vested the Town with title to a sewer easement by inverse condemnation. Because those issues are necessary to the resolution of *Apex v. Rubin I*, she contends the Town's declaratory judgment action, and by extension its request for a preliminary injunction, are barred by *res judicata* and the prior action pending doctrine.

1. Appellate Jurisdiction

¶ 14 **[1]** We first resolve the question of appellate jurisdiction. Both parties agree that Ms. Rubin seeks to appeal two interlocutory orders, and that such orders are not subject to immediate appellate review unless they affect a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). As explained below, we conclude both orders affect a substantial right.

¶ 15 Interlocutory orders rejecting a *res judicata* defense may affect a substantial right when " '(1) the same factual issues would be present

in both trials and (2) the possibility of inconsistent verdicts on those issues exists.' " *Whitehurst Inv. Props, LLC v. NewBridge Bank*, 237 N.C. App. 92, 96, 764 S.E.2d 487, 490 (2014) (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 628, 727 S.E.2d 311, 315 (2012)).

¶ 16 Both prongs are satisfied here. *Apex v. Rubin I* and the declaratory judgment action arise out of the same factual issues. In *Apex v. Rubin I*, the Town sought relief from the Judgment by asserting that: (1) the installation of the sewer pipe and dismissal of the direct condemnation action gave it title by inverse condemnation; and (2) Ms. Rubin's sole remedy is monetary compensation for the inverse condemnation. Here, the Town alleges ownership of a sewer easement based on these same facts under the same legal theory, and again asserts Ms. Rubin can only receive monetary compensation for the taking in an amount determined by a jury. Given our holding in *Apex v. Rubin I* that the Town does not have title to any sewer easement across Ms. Rubin's land under any condemnation theory, that she cannot be compelled to accept monetary compensation for the violation of her constitutional rights, and that she may seek mandatory injunctive relief through a separate trespass claim for the Town's unlawful presence, the declaratory judgment action presents a possibility of inconsistent verdicts on the question of the Town's ownership of a sewer easement and, by extension, the remedy available to Ms. Rubin for the taking.

¶ 17 The trial court's orders denying Ms. Rubin's motion, based on *res judicata*, to dismiss the Town's declaratory judgment action and granting the Town's motion for preliminary injunction entered conclude—contrary to our holdings in *Apex v. Rubin I*—that the Town has title to a sewer easement by inverse condemnation and Ms. Rubin's sole remedy is monetary compensation. These orders thus affect a substantial right and we deny the Town's motion to dismiss this appeal.

¶ 18 Even assuming, *arguendo*, that the trial court's orders do not affect a substantial right, Ms. Rubin's petition for writ of certiorari is appropriate to "serve the expeditious administration of justice or some other exigent purpose." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). The interests of judicial economy are implicated and may be well served by certiorari review of interlocutory orders when they are "interrelated [in] nature" to other issues on appeal as a matter of right. *Jessee v. Jessee*, 212 N.C. App. 426, 431, 713 S.E.2d 28, 33 (2011). *See also Radcliffe v. Avenel Homeowners Ass'n*, 248 N.C. App. 541, 551, 789 S.E.2d 893, 901-02 (2016) (granting certiorari review of interlocutory orders when they "factually overlapp[ed]" with other issues on review).

Our resolution of *Apex v. Rubin I* necessarily impacts the claims and defenses available to the parties in the declaratory judgment action, and, given this overlap, the interests of judicial economy are served by immediate review of the interlocutory orders at issue here.[2] As a result, and even absent a substantial right, we would grant Ms. Rubin's petition for certiorari review of the trial court's denial of her motion to dismiss and its preliminary injunction order.

2. Standards of Review

¶ 19 We review a denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). In undertaking this review, "[w]e consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted). A 12(b)(6) motion:

> is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail. It is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy.

N.C. Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974) (citations omitted).

¶ 20 Review of an order granting a preliminary injunction is also "essentially *de novo*." *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984). This extends to findings of fact made by the trial court, as "an appellate court is not bound by the findings [in the preliminary injunction order], but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983) (citations omitted). Even so, "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003) (citation omitted). A preliminary injunction is only available:

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2. The Town did not oppose Ms. Rubin's petition for certiorari review and conceded at oral argument that this appeal overlaps with *Apex v. Rubin I*.

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted).

3. Res Judicata Precludes Relitigation of Title to the Sewer Easement

¶ 21 **[2]** Ms. Rubin argues that the Judgment in *Apex v. Rubin I* and *res judicata* bars the Town "from relitigating whether the Town has a claim to an easement on Ms. Rubin's property." We agree.

¶ 22 "Generally, in order that the judgment in a former action may be held to constitute an estoppel as res judicata in a subsequent action there must be identity of parties, of subject matter and of issues." *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953). All three requirements are met here. The parties are the same. The subject matter, namely, a sewer easement across Ms. Rubin's land to serve Riley's Pond, is the same. And the issues—whether the Town can compel Ms. Rubin to surrender title to such an easement in exchange for compensation—are the same. In fact, despite now claiming *Apex v. Rubin I* did not involve the same facts or issues, the Town moved for—and received—relief from the Judgment on the basis that "[t]he sewer easement is the subject of the captioned [direct] condemnation . . . [and] [t]he inverse condemnation of the sewer easement . . . transferred title to the easement to the Town." And though the Town now argues *res judicata* should not apply because the Judgment in *Apex v. Rubin I* did not specifically address a taking by inverse condemnation, a party cannot escape the doctrine's application merely by swapping theories of recovery. *See, e.g.*, *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) ("The defense of res judicata may not be avoided by shifting legal theories or asserting a different ground for relief." (citations omitted)).

¶ 23 As we held in *Apex v. Rubin I*, binding precedents preclude us from holding that the Town took title to a sewer easement by inverse condemnation across Ms. Rubin's land by virtue of its " [']precipitate entry and construction' " during the pendency of the direct condemnation action and in the face of Ms. Rubin's defense that the taking was for a non-public purpose. *Apex v. Rubin I*, 277 N.C. App. at 340-41, 2021-NCCOA-187, ¶ 23 (quoting *State Highway Comm'n v. Thornton*, 271 N.C. 227, 237,

156 S.E.2d 248, 256 (1967)). *See also Town of Midland v. Morris*, 209 N.C. App. 208, 214, 704 S.E.2d 329, 335 (2011) (holding a "city [cannot] obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment"). The Judgment in *Apex v. Rubin I*, involving the same parties, subject matter, and issues, was therefore res judicata as to any claim by the Town that the completion of the sewer pipe during the direct condemnation action vested it with title to a sewer easement.[3] We reverse the denial of Ms. Rubin's motion to dismiss as it pertains to this claim.

¶ 24 We are unpersuaded by the Town's argument that our decision in *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986), supports a determination that *res judicata* does not apply here. In *Rousso*, the City of Charlotte filed a direct condemnation action to convert a landowner's lot into retail space for rent by private enterprises. *Id.* at 589, 346 S.E.2d at 694. When that direct condemnation action was dismissed as for a non-public purpose, Charlotte filed a new direct condemnation action seeking to take the same lot for a public park. *Id.* We held that the new condemnation action was not barred by *res judicata* because the change in purpose meant it was "not based upon the same facts as the prior case . . . [and] [wa]s free of the illegal taint that caused the earlier case to fail." *Id.*

¶ 25 We are not persuaded that this Court's decision in *Rousso* supports the Town's position here. The condemnor in *Rousso* fundamentally changed its purpose for taking the landowner's property—from use for retail space to use for a public park—before bringing its second condemnation action. No such change has occurred here, as the Town has simply changed its legal theory to take a sewer easement across Ms. Rubin's land to serve Riley's Pond. Further, unlike the condemnor in *Rousso*, the Town has not filed a second direct condemnation action, but instead claims title through inverse condemnation by dint of the sewer pipe it *installed for a non-public purpose in the failed direct condemnation action*. Nothing has rendered the Town's actions "free of the illegal taint that caused the earlier case to fail," *Rousso*, 82 N.C. App. at 589, 346 S.E.2d at 694, so *res judicata* applies.

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3. The Town, as it did in *Apex v. Rubin I*, relies on *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), for the proposition that it can claim title to the easement by inverse condemnation irrespective of the Judgment in the direct condemnation action. We find *Wilkie* inapplicable here for all the reasons stated in *Apex v. Rubin I*, 277 N.C. App. at 342, 2021-NCCOA-187, ¶ 26. *Wilkie* did not involve the doctrine of *res judicata* or the issue of whether a condemnor can swap its legal theory of ownership from direct condemnation to inverse condemnation when an action under the former fails.

4. Res Judicata Bars the Town's Claims that Inverse Condemnation Is Ms. Rubin's Sole Remedy, Compensation Is Her Sole Relief, and Mandatory Injunctive Relief is Unavailable

¶ 26 **[3]** We likewise conclude that our holding in *Apex v. Rubin I* and *res judicata* bar a declaratory judgment limiting Ms. Rubin's remedy to compensation pursuant to an inverse condemnation claim. In *Apex v. Rubin I*, the Town moved for relief from the Judgment on the ground, among others, that inverse condemnation is the only cause of action available to Ms. Rubin, that "[t]he exclusive remedy to which [Ms.] Rubin is entitled for inverse condemnation is compensation," and that "the Town . . . [is] insulate[d] from [Ms.] Rubin's claim that she is entitled to mandatory injunctive relief." The trial court then entered orders agreeing with those arguments. Despite requesting and receiving an order relieving it from the Judgment on those bases in the direct condemnation action, the Town nonetheless sought and obtained an identical determination in its declaratory judgment action. Because these claims for declaratory relief involve the same parties, the same subject matter, and the same issues as those raised and determined in *Apex v. Rubin I*, our holding therein that Ms. Rubin cannot be compelled to accept compensation and may instead elect to pursue mandatory injunctive relief through a trespass claim bars relitigation of these questions by the Town in its declaratory judgment action. *Apex v. Rubin I*, 277 N.C. App. at 348, 2021-NCCOA-187, ¶ 42.

5. The Town's Remaining Claims Are Not Barred

¶ 27 **[4]** The Town's declaratory judgment action seeks resolution of other claims that we conclude are not barred, because they were not addressed in the Judgment. Specifically, the complaint alleges the Town's ownership of the pipe itself, asserts "[a] genuine controversy exists between the Town and [Ms.] Rubin as to their rights and duties regarding the underground sewer line," requests a permanent injunction "enjoining [Ms.] Rubin . . . from removing or disturbing the sewer line," and seeks a declaration that "the doctrines of laches, economic waste, and other similar equitable doctrines bar [Ms. Rubin] from causing the removal of the sewer pipe." The question raised by these claims—what is to be done with the Town's encroaching pipe following the Judgment now that fee simple title in the land reverted back to Ms. Rubin—was not raised by Ms. Rubin or addressed by the Judgment in *Apex v. Rubin I*. As our opinion explains:

> [T]he Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and

> divesting the Town of any legal title or lawful claim to encroach on it.
>
> But because Ms. Rubin did not seek mandatory injunctive relief in the direct condemnation action, she is not entitled to that remedy by the plain language of the Judgment. . . . The trial court . . . rendered its Judgment declaring null and void both the direct condemnation action and the Town's "quick take" title to the easement. The Judgment, given the issues raised before the trial court, did nothing more than that.

Apex v. Rubin I, 277 N.C. App. at 344, 2021-NCCOA-187, ¶¶ 32-33 (citations omitted).

¶ 28 *Thornton*, discussed at length in *Apex v. Rubin I*, likewise suggests that dismissal of a direct condemnation action does not serve to fully and finally adjudicate what relief is available against parties who continue to occupy the land when the landowner did not seek an injunction during condemnation. In such a circumstance, the prevailing landowners "are entitled to have [the direct condemnation] proceeding dismissed, *leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so*." *Thornton*, 271 N.C. at 240, 156 S.E.2d at 258 (emphasis added). Here, because the Judgment addressed only whether the Town lawfully took title to a sewer easement across Ms. Rubin's land—and not what must now be done with the installed sewer pipe—the extent and enforcement of the "rights [Ms. Rubin] may have" against the Town were not adjudicated in the Judgment. The Town's declaratory judgment action therefore presents new issues,[4] namely whether the trespassing Town must remove its pipe or can preclude Ms. Rubin from disturbing it despite title based on "laches, economic waste, and other similar equitable doctrines."[5]

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4. We do not address whether the Town might ultimately prevent a removal of the pipe based on the equitable doctrines asserted in its complaint, as that is not the question raised by a 12(b)(6) motion to dismiss a declaratory judgment action. *See*, *e.g.*, *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366, S.E.2d 556, 558 (1988) ("A motion to dismiss for failure to state a claim is seldom appropriate in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail.").

5. At least one of the equitable doctrines contemplated by the Town is generally raised as an affirmative defense. *See*, *e.g.*, *MMR. Holdings*, *LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001) (describing the equitable doctrine of laches as an "affirmative defense"). And we acknowledge that *res judicata* "bars every ground of

¶ 29 Ms. Rubin further contends that the declaratory judgment action should be dismissed *in toto* because the complaint allegedly failed to disclose a genuine controversy. She premises this argument on her belief that the question of whether removal of the sewer pipe is required had already been fully adjudicated and determined in *Apex v. Rubin I*. However, as we have stated, the Judgment simply determined title reverted to Ms. Rubin and did not address what must be done with the Town's pipe under her land. We therefore reject this argument.

¶ 30 We also conclude that the prior action pending doctrine does not require dismissal of the Town's request for a declaration as to whether the pipe must be moved or may remain under some equitable theory absent title. Under the doctrine, "[w]hen a prior action is pending between the same parties, affecting the same subject matter in a court within the state . . . having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to plea in abatement." *State ex rel. Onslow Cty. v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998) (citations omitted). However, for purposes of the doctrine, "[a]n action is deemed to be pending from the time it is commenced until its final determination," and the rights available to Ms. Rubin were finally determined upon entry of the Judgment. *Apex v. Rubin I*, 277 N.C. App. at 344, 2021-NCCOA-187, ¶¶ 32-33. While Ms. Rubin raised in her post-judgment motions the issue of whether the Town must be compelled to remove the pipe, we have held that the Judgment did not award her such relief and she was not entitled to obtain it in that action. *Id.* at 344, 2021-NCCOA-187, ¶ 33. In other words, because the Judgment did not grant mandatory injunctive relief, despite Ms. Rubin's post-judgment motions, no proper action regarding removal of the pipe was pending at the time the Town filed its declaratory judgment action.

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recovery *or defense* which was actually presented or which could have been presented in the previous action." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37 (1988) (emphasis added). However, because Ms. Rubin did not assert a claim for mandatory injunctive relief in the prior action and did not receive a judgment to that effect, any equitable defenses to such relief are not barred by *res judicata*. *See Walton v. Meir*, 10 N.C. App. 598, 604, 179 S.E.2d 834, 838 (1971) ("[T]his principle simply means that a defendant must assert any defense that he has available, and that he will not be permitted in a later action to assert as an affirmative claim, a defense, which if asserted and proved as a defense in the former action, *would have barred the judgment entered in plaintiffs' favor*." (emphasis added)).

6. The Preliminary Injunction

¶ 31 **[5]** A preliminary injunction is proper:

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his [or her] case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Ridge Cmty. Inv'rs, Inc. v. Berry, 293 N.C. 688, 701 239 S.E.2d 566, 574 (1977). Ms. Rubin only challenges the first prong, arguing that the Town cannot show a likelihood of success on the merits because the entire complaint should have been dismissed under *res judicata* or prior action pending grounds. We agree with Ms. Rubin that the Town cannot succeed on its claims that are barred by *Apex v. Rubin I* and *res judicata*, as discussed in Parts II.3-4 above. We therefore vacate findings of fact 9, 11, 14, 20, and 21, as well as a portion of conclusion of law 2, in the preliminary injunction order that are contrary to *Apex v. Rubin I*. In light of today's decisions in these cases, the Town cannot show a likelihood of success on those claims.

¶ 32 Ms. Rubin further asserts the trial court erred in finding as a fact that there are no practical alternatives to the currently installed sewer line that could provide sewer service to Riley's Pond. She points out that documents provided to the trial court by both parties demonstrate numerous alternatives to the sewer pipe currently running through her property. Based on the evidence of record, we vacate finding of fact 28 and the portion of conclusion of law 10 stating that there are no practical alternatives to the sewer line already installed on Ms. Rubin's land.

¶ 33 Though we vacate portions of the preliminary injunction order, we ultimately leave it undisturbed in light of our holding that the Town's request for a declaration resolving whether the pipe may be removed is not subject to dismissal. We must presume the preliminary injunction was proper, and Ms. Rubin bears the burden of showing error to rebut the presumption. *Analog Devices, Inc.*, 157 N.C. App. at 465, 579 S.E.2d at 452. Ms. Rubin has offered no argument against a likelihood of success on this claim beyond the *res judicata* and prior action pending arguments, which we have rejected, so she has not rebutted the presumption that the trial court correctly determined the Town was likely

to succeed on this claim.[6] We therefore affirm the remainder of the preliminary injunction order.

III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the trial court's denial of Ms. Rubin's motion to dismiss as to declarations (1)-(7) sought by the Town in paragraph 27 of its amended complaint. We affirm the denial of Ms. Rubin's motion as to declaration (8) requested by that same paragraph. As to the preliminary injunction order, we vacate findings of fact 9, 11, 14, 20, 21, and 28, as well as those portions of conclusions of law 2 and 10 described above. We affirm the remainder of the preliminary injunction order and remand this action to the trial court for further proceedings not inconsistent with this opinion.

REVERSED IN PART; VACATED IN PART; AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

Judges DILLON and JACKSON concur.

6. Our vacatur of the finding and conclusion that no alternatives to the current sewer pipe exist does not preclude affirmance of the preliminary injunction. The second prerequisite to a preliminary injunction—which is not argued by Ms. Rubin on appeal—is satisfied "if . . . , in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Inv'rs, Inc.*, 293 N.C. at 701, 239 S.E.2d at 574. As set forth above, Ms. Rubin only challenges a likelihood of success on the merits and the specific factual determination that there were no alternatives to the existing sewer line; she levies no argument against the trial court's conclusion that the preliminary injunction was necessary to protect the Town's rights in the pipe pending litigation of the declaratory judgment action. Absent argument to that effect, Ms. Rubin has not rebutted the presumption that the trial court properly entered a preliminary injunction on that basis.

STATE v. SECHREST

[277 N.C. App. 372, 2021-NCCOA-204]

STATE OF NORTH CAROLINA
v.
JEFFERY LEE SECHREST, DEFENDANT

No. COA20-256

Filed 4 May 2021

1. Indictment and Information—indictment—indecent liberties —initials of minor victim—facially valid

An indictment charging defendant with taking indecent liberties with a child was facially valid where the victim was identified only by her initials, in accordance with the analysis set forth in *State v. McKoy*, 196 N.C. App. 650 (2009), which the Court of Appeals determined was not overruled by *State v. White*, 372 N.C. 248 (2019) (holding that a reference to "Victim #1" was insufficient for a sex offense indictment). Defendant's indictment stated the elements of the offense listed in N.C.G.S. § 14-202.1, defendant had sufficient notice of the victim's identity to prepare his defense, and there could be no confusion over the victim's identity where she testified at trial and used her full name in court.

2. Evidence—indecent liberties trial—recorded interview with victim—statements by DSS social worker—credibility vouching

In a trial for taking indecent liberties with a child, the trial court did not err by admitting a recorded interview of the child victim by a DSS social worker, during which the social worker said "no kid should ever be put in that situation by an adult" and that "[adults] should know better," because those statements did not impermissibly vouch for the victim's credibility. The statements were made to comfort the victim as she recounted her experiences with defendant and did not constitute an opinion about whether the victim was telling the truth or that a sexual offense had in fact taken place.

3. Evidence—indecent liberties trial—text messages between child victim and relative—credibility vouching

In a trial for taking indecent liberties with a child, there was no plain error in the admission of a series of text messages between the child victim and her uncle, in which they discussed defendant's conduct toward the victim, with the uncle describing that conduct as "illegal." The text messages did not have a probable impact on the jury's verdict where the jury was properly instructed on its role in assessing witness credibility, the victim testified extensively at trial,

and defendant stated that "maybe things did go a little too far" when referring to the incident that gave rise to the criminal charge.

Appeal by Defendant from judgment entered 18 July 2019 by Judge Susan E. Bray in Montgomery County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

MURPHY, Judge.

¶ 1 The indecent liberties with a child indictment that used initials to name the child victim was not facially invalid. Additionally, the trial court did not commit plain error when it allowed witnesses to recount to the jury their conversations with the victim.

BACKGROUND

¶ 2 On 27 May 2018, Defendant Jeffery Sechrest attended a cookout at his father's camper that his father's fiancée, Jeanne,[1] and her relative, Kate,[2] also attended. Defendant was 40 years old and Kate was 15 years old. After discussing her desire to ride a motorcycle, Kate went on a motorcycle ride with Defendant where they discussed topics such as relationships, drugs, alcohol and sex. Defendant asked Kate whether she was a virgin and about her favorite sexual positions. Defendant and Kate returned to Defendant's father's camper after approximately 30 minutes.

¶ 3 The following day, 28 May 2018, Jeanne and Kate returned to Defendant's father's camper. Defendant took Kate on another motorcycle ride. About fifteen or twenty minutes into the ride, it began to rain and Defendant suggested they stop at his house until the rain cleared up. Upon arrival, Defendant offered Kate a drink in a brown bottle that she believed to be alcohol. While showing Kate an album

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

2. A pseudonym abbreviation will also be used for the juvenile's initials when referred to in the indictment.

of half-naked women, Defendant smoked methamphetamine. He then played pornography for Kate on his television, but turned it off after she asked to watch the movie *Suicide Squad*. While Kate and Defendant were watching the movie, Defendant grabbed Kate and pressed his face against hers to kiss her. Kate pushed away Defendant and told him she was uncomfortable; however, Defendant continued to kiss her and pull her up on his lap. Despite multiple objections from Kate, Defendant proceeded to put his hands under her shirt and touch her breasts. During this encounter, Kate's phone received a text message, which she used as an opportunity to escape and told Defendant she was ready to go back to the camper. Defendant took Kate back to the camper where they ate pizza with Jeanne and Defendant's father.

¶ 4 Kate returned home later that evening and texted her uncle, Andrew, to explain what happened on 27 and 28 May 2018. Andrew expressed his concerns to Kate and suggested she speak to her school's guidance counselor. At the start of the school week, Kate spoke to her school's resource officer and guidance counselor regarding the actions of Defendant. Kate was then interviewed by Morgan Halkyer ("Halkyer"), a Randolph County Department of Social Services ("DSS") employee. This interview was recorded.

¶ 5 Defendant was indicted for indecent liberties with a child and the case came on for trial during the 15 July 2019 session of Montgomery County Superior Court. At trial, the jury heard from Matthew Shoffner ("Shoffner"), Defendant's probation officer. Schoffner testified Defendant denied any sexual contact, but stated "maybe things did go a little too far." Additionally, the text messages between Kate and Andrew were admitted into evidence and published for the jury as well as the recorded interview between Halkyer and Kate.

¶ 6 The jury found Defendant guilty of indecent liberties with a child. He then pleaded guilty to attaining the status of habitual felon and was sentenced to 127 to 165 months. Defendant timely appealed.

ANALYSIS

¶ 7 Defendant argues the trial court lacked subject matter jurisdiction to enter judgment on the indecent liberties with a child conviction because the alleged victim was identified only by her initials in the indictment. Defendant also argues the trial court committed plain error by allowing an expert witness's statements on a recording and a lay witness's text messages with Kate where the statements and text messages improperly vouched for Kate's credibility.

A. Sufficiency of the Indictment

¶ 8 **[1]** Defendant argues because the indecent liberties with a child indictment referenced the victim by only her initials and not her full name, it was fatally defective and the defect rendered the trial court without subject matter jurisdiction to enter judgment on the indecent liberties with a child conviction against Defendant. "[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

¶ 9 We note Defendant failed to object to the sufficiency of the indictment in the trial court and only raises this argument on appeal. Despite this, an argument that the trial court lacked subject matter jurisdiction may be raised at any time after a verdict. *See State v. Harwood*, 243 N.C. App. 425, 427-28, 777 S.E.2d 116, 118 (2015) ("The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*."). Since indictments confer subject matter jurisdiction on the trial court, Defendant's argument may be raised for the first time on appeal. *See State v. Rogers*, 256 N.C. App. 328, 337, 808 S.E.2d 156, 162 (2017) ("In criminal cases, a valid indictment gives the trial court its subject matter jurisdiction over the case.").

¶ 10 Generally, "[a] criminal pleading, such as an [indictment], is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)).

> [I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

¶ 11 We have previously determined the use of initials to identify a victim is sufficient for a second-degree rape and second-degree sexual offense indictment. *See McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410. Defendant argues *McKoy* is no longer binding after our Supreme Court's opinion in *State v. White*. 372 N.C. 248, 827 S.E.2d 80 (2019). Defendant asks us to extend the holding of *White* as it "undercuts the viability of

McKoy" and essentially overturns our decision in *McKoy*. In *White*, our Supreme Court discussed *McKoy* in determining whether the phrase "Victim #1" was sufficient to name the victim in a sex offense indictment. *Id.* at 251-53, 827 S.E.2d at 82-83. Our Supreme Court concluded:

> Even if this Court decides that initials are sufficient to satisfy the "naming the victim" requirement, the indictment in this case is still insufficient. The State concedes that its intent was to conceal the identity of the child–an intent at odds with the purpose of the naming requirement: to provide notice of the essential elements of the crime charged to the accused. Thus, use of the phrase "Victim #1" does not constitute "naming the child."

Id. at 252, 827 S.E.2d at 83. Nowhere in *White* does our Supreme Court explicitly or implicitly overrule our decision in *McKoy*. Additionally, *White* does not address the issue of naming a victim solely by their initials since the indictment there referenced the victim as "Victim #1." *McKoy* remains our binding precedent and "the use of initials to identify a victim [] require[s] [us] to employ the *Coker* and *Lowe* tests to determine if [the] indictment [was] sufficient to impart subject matter jurisdiction." *McKoy*, 196 N.C. App. at 658, 675 S.E.2d at 412.

¶ 12 In order to determine if the lack of a victim's full name renders an indictment fatally defective, *Coker* requires us to inquire whether a person of common understanding would know the intent of the indictments was to charge Defendant with indecent liberties with a child. *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984). Additionally, *Lowe* requires us to inquire whether Defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by use of the victim's initials. *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978).

¶ 13 Defendant's indictment for indecent liberties with a child alleges:

> The jurors for the State upon their oath present that on or about the date(s) of the offense shown and in the county named above [Defendant] named above unlawfully, willfully and feloniously did commit and attempt to commit a lewd and lascivious act upon the body of [KA], who was under the age of 16 years at the time. At the time, [Defendant] was over 16 years of age and at least five years older than that child.

N.C.G.S. § 14-202.1 states:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with *any child of either sex under the age of 16 years* for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of *any child of either sex under the age of 16 years*.

N.C.G.S. § 14-202.1(a) (2019) (emphasis added). The indictment here tracked the statutory language of N.C.G.S. § 14-202.1. *Id.* While the statute defining taking indecent liberties with a child requires the offense to be with "any child of either sex under the age of 16 years," *id.*, the indictment charging this offense "does not need to state the victim's full name, nor [does it] need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person." *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410. A person of common understanding would know the intent of the indictment is met here. The *Coker* prong of *McKoy* is satisfied.

¶ 14 Turning to the *Lowe* prong of the *McKoy* analysis, the Record demonstrates Defendant also had notice of the identity of the victim. The arrest warrants served on Defendant listed the victim's full name, including her middle name. *See McKoy*, 196 N.C. App. at 657-58, 675 S.E.2d at 412. Defendant was interviewed by multiple law enforcement officers regarding his contact with the victim, in which he admitted he knew Kate. *See id.* at 658, 675 S.E.2d at 412. Further, Defendant makes no argument on appeal he had difficulty preparing his case because of the use of "KA" instead of the victim's full name. *See id.* In addition, Kate testified at trial and identified herself by her full name in open court. *See id.* There is no possibility that Defendant was confused regarding the identity of the victim and therefore the use of "KA" in the indictment provided Defendant with sufficient notice to prepare his defense and protect himself against double jeopardy.

¶ 15 The indictment charging Defendant with taking indecent liberties with a child was sufficient to meet the analysis emphasized by *McKoy* as outlined in *Coker* and *Lowe*.

B. Vouching

¶ 16 Defendant argues the trial court plainly erred by admitting testimony and evidence that vouched for the credibility of the victim. Defendant did not object to the admission of this evidence throughout the trial, and we review for plain error. N.C. R. App. P. 10(a)(4) (2021); *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). The standard for plain error is well established:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, *the error had a probable impact on the jury's finding that the defendant was guilty.* Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and marks omitted) (emphasis added).

¶ 17 "[T]he trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility." *State v. Warden*, 376 N.C. 503, 504, 852 S.E.2d 184, 186 (2020). However, witnesses generally are permitted to explain their own observations of the alleged victim or evidence gathered in the case. *See State v. Wise*, 326 N.C. 421, 427-28, 390 S.E.2d 142, 146, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990) (holding no error where a witness merely described her personal observations concerning the emotions of the victim during their counseling sessions). Defendant argues both Halkyer and Andrew made statements that impermissibly vouched for Kate's credibility. We disagree and find no error in admitting Halkyer's statements and no plain error in admitting Andrew's statements.

1. Expert Witness Opinion: Morgan Halkyer

¶ 18 **[2]** "In child sexual abuse cases, where there is no physical evidence of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony." *State v. Crabtree*, 249 N.C. App. 395, 401, 790 S.E.2d 709, 714 (2016), *aff'd per curiam*, 370 N.C. 156, 804 S.E.2d 185

(2017); *see State v. O'Connor*, 150 N.C. App. 710, 712 & n.1, 564 S.E.2d 296, 297 & n.1 (finding plain error in the admission of an expert witness's written report stating the victim's disclosure was "credible" and noting "[t]here is no reason to distinguish between an expert's opinion presented through oral testimony and an expert's opinion expressed in written form"), *disc. rev. denied*, 356 N.C. 173, 567 S.E.2d 144 (2002). "[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curiam). "[T]he same [rule] applies to a witness who is a DSS worker or child abuse investigator because, even if she is not qualified as an expert witness, the jury will most likely give her opinion more weight than a lay opinion." *Crabtree*, 249 N.C. App. at 402, 790 S.E.2d at 714-15.

¶ 19 During her recorded interview with Kate that was played for the jury, Halkyer made the following statements:

> You have like an entourage of people that kind of kicked in like that (*snaps fingers*) to make sure you are safe and healthy, like that's pretty cool. . . . No kid should ever be put in that situation by an adult, you know, they're an adult, they should know better . . . What do you think about that, all those people kind of kicking in gear?

Defendant argues these statements were impermissible vouching because they characterized Defendant as an adult that "should have known better" and a "sexually violent predator who should have known what he did was wrong."

¶ 20 We hold Halkyer did not impermissibly vouch for Kate's credibility. Halkyer's statements on the recording that "no kid should ever be put in that situation by an adult" and "[adults] should know better" were not tantamount to an opinion that Kate was credible.

¶ 21 In *State v. Stancil*, our Supreme Court held:

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation,

> as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

Stancil, 355 N.C. at 266-67, 559 S.E.2d at 789 (internal citations omitted). In *State v. Ryan*, we held the following testimony from a doctor improperly vouched for the credibility of the minor victim:

> [THE STATE:] Have you ever diagnosed or made a finding that a child is not being truthful?
>
> [DOCTOR:] I have done that on several occasions.
>
> [THE STATE:] Can you explain to the jurors what you look for, the clues that you look for, and do you do that in every case?
>
> [DOCTOR:] I do it in every case.
>
> [THE STATE:] Was there anything about your examination of the child that gave you any concerns in this regard?
>
> [DOCTOR:] That gave me concerns that she was giving a fictitious story?
>
> [THE STATE:] Yes.
>
> [DOCTOR:] Nothing. There was nothing about the evaluation which led me to have those concerns. And again, as I was getting into her history and considering this as a possibility, nothing came out.

State v. Ryan, 223 N.C. App. 325, 334, 734 S.E.2d 598, 604 (2012), *disc. rev. denied*, 366 N.C. 433, 736 S.E.2d 139 (2013). We concluded the doctor's testimony that she had no concerns the child was "giving a fictitious story" was "tantamount to her opinion that the child was not lying about the sexual abuse." *Id.*

¶ 22 Here, unlike in *Ryan*, Halkyer's statements on the recording did not impermissibly vouch for the credibility of Kate. The statements on the recording did nothing more than provide the jury with the context of Halkyer's interview with Kate. Halkyer was not attempting to give her opinion on whether Kate was lying about the sexual offense, but rather was comforting Kate with general statements about adult behavior while Kate reported a traumatic life event. Halkyer's statements on the recording are distinguishable from cases like *Ryan*, where we have held the witness was impermissibly vouching because Halkyer's statements

on the recording are in no way tantamount to an opinion that the sexual offense had in fact occurred or that the child was not lying. The trial court did not err in allowing Halkyer's statements on the recording to be played to the jury.

2. Lay Witness Opinion: Andrew

¶ 23 **[3]** Defendant's remaining argument contends the trial court plainly erred by admitting the text messages of a lay witness, Andrew.[3] Defendant specifically argues the admission of certain text messages between Andrew and Kate was plain error because Andrew's text messages "emphatically" stated Defendant committed a crime even if the conduct did not rise to the level of sexual assault. Among the text messages shown to the jury were the following exchanges:

> [Andrew]: Have you spoken to someone at school yet
>
> [Kate]: No..
>
> Well… I didn't give names or the whole story.. But I was talking to my PE teacher. Cause we are having Sex Ed week and asked about sexual assault and everything
>
> [Andrew]: What did they say
>
> [Kate]: It's not sexual assault because I didn't say no..
>
> [Andrew]: Who said that?!?!
>
> [Kate]: A teacher
>
> [Andrew]: Did [the teacher] know he was 40?!?
>
> [Kate]: No
>
> I just said it in general
>
> [Andrew]: You need to not speak in general darlin. You don't have to be explicit but they need to understand that a 40 year old man took you too [sic] his house and

3. At trial, these documents were identified as text messages through the Facebook Messenger platform.

attempted inappropriate actions. It's may not be sexual assault but it is illegal

That's why I suggested a counselor because those should be protected conversations.

[Kate]: I'll go into her office after this class…I'll tell you what she says

Although if it isn't sexual assault what [is it]?

[Andrew]: It will turn into assault if you were to keep resisting. You're 15 and he is preying on you.

[frown emoji]

It is not your fault.

[Kate]: I didn't say no. I didn't refuse. I just let him do it.

[Andrew]: But did you want him to?

[Kate]: No

[Andrew]: Then you did say no and did refuse.

You shouldn't have to verbalize not wanting a 40 year old man to do something to you.

. . .

[Andrew]: How do you feel?

[Kate]: I'm okay…I keep reliving that moment and it disgusts me…I just wanna get past this…although it's crazy. Cause now I'm more sensitive when people come up to me…Like if they touch me all of the sudden…I jump…

[Andrew]: Understandable but you can easily get past that. If it had continued, more [] damage would have been done physically and mentally. You are being extremely brave standing up to this.

The crux of Defendant's argument is that Andrew "essentially usurped the jury's duty to determine whether a crime happened by emphatically stating that one did" and the effect of these exchanges invited the jury to improperly conclude Defendant committed a crime.

¶ 24 "Our [caselaw] has long held that a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). As previously stated, to establish plain error, a defendant must show the error "was a fundamental error—that the error had a probable impact on the jury verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Here, Defendant cannot establish plain error because he has not demonstrated the above cited testimony and evidence had a "probable impact on the jury verdict." *Id.* Prior to deliberations, the trial court read and provided the pattern cautionary instruction to the jury regarding the credibility, interest, bias, and partiality of witnesses:

> You are the sole judges of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony. In deciding whether to believe a witness, you should use the same tests for truthfulness that you use in your everyday lives. Among other things, these tests may include the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice, or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is reasonable and whether the testimony is consistent with other believable evidence in the case.

See N.C.P.I.—Crim. 101.13 (2019). The members of the jury were informed they could consider any potential interest or partiality Andrew may have had toward his niece. Likewise, the jury understood it could consider any negative bias Andrew may have harbored toward Defendant (a 40-year-old man who allegedly molested his niece). Given the jury's ultimate role regarding the believability of lay witnesses, and in light of the fact Kate provided extensive testimony at trial, along with Defendant's statement "maybe things did go a little too far[,]" we cannot say the admission of

Andrew's text messages had a probable impact on the jury's verdict. The trial court did not plainly err in allowing Andrew's text messages.

¶ 25 Even if we assume there was error when the trial court did not intervene when Andrew's text messages with Kate were admitted into evidence, Defendant has not demonstrated plain error. Kate testified at length regarding Defendant's actions and provided details and descriptions. From this and the surrounding circumstances, the jury could have considered and weighed it in light of the otherwise admissible evidence presented. The jury had the opportunity to observe Kate's testimony and make its own independent determination about her credibility. Defendant has not demonstrated allowing Andrew's text messages had a probable impact on the jury's verdict. As a result, any error was not plain error.

CONCLUSION

¶ 26 The indictment for taking indecent liberties with a child naming the victim only by her initials was sufficient under *McKoy*, which remains binding on our Court. Defendant has failed to demonstrate the trial court committed plain error in admitting an expert witness's statements on a recording from DSS employee Halkyer. Further, Defendant has failed to establish plain error in the trial court's admission of a lay witness opinion on text messages relating to the credibility of the minor victim.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges ZACHARY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 May 2021)

IN RE E.Y.B. 2021-NCCOA-64 No. 20-576	Haywood (19JA54) (19JA55)	Affirmed
GRAY v. HOLLIDAY 2021-NCCOA-178 No. 20-425	New Hanover (18CVD3579)	AFFIRMED IN PART; REMANDED IN PART.
BALDWIN v. JAMES 2021-NCCOA-189 No. 20-307	Mecklenburg (18CVD5805)	Affirmed
BRADLEY v. TAPIA 2021-NCCOA-190 No. 20-453	Davidson (19CVD2303)	Affirmed
HOUSE v. RICE 2021-NCCOA-191 No. 20-430	Buncombe (19CVS262)	Affirmed
IN RE J.P. 2021-NCCOA-192 No. 20-771	Scotland (19JA107)	Affirmed in part; reversed and remanded in part.
IN RE M.Y. 2021-NCCOA-193 No. 20-848	Wake (19JA201-204)	Affirmed in part; Vacated in part and Remanded.
MAXWELL v. MAXWELL 2021-NCCOA-194 No. 20-161	Guilford (11CVD8181)	Affirmed
STATE v. BOGER 2021-NCCOA-195 No. 20-393	Iredell (20CRS40)	Affirmed
STATE v. CHRISTOPHER 2021-NCCOA-196 No. 19-1009	Gaston (16CRS059263) (16CRS59270-76)	No Error
STATE v. HARRISON 2021-NCCOA-197 No. 20-327	Alamance (16CRS54509)	No Error
STATE v. HOOD 2021-NCCOA-198 No. 19-1136	Mecklenburg (16CRS246385-86)	No Prejudicial Error

STATE v. INMAN 2021-NCCOA-199 No. 20-652	Lincoln (18CRS51896)	No Error
STATE v. KILLIAN 2021-NCCOA-200 No. 20-163	Henderson (18CRS202)	No Error
STATE v. KING 2021-NCCOA-201 No. 20-554	Wilson (18CRS50092)	Dismissed
STATE v. LEWIS 2021-NCCOA-202 No. 20-641	Caldwell (16CRS824)	Affirmed
STATE v. PITTMAN 2021-NCCOA-203 No. 19-781	Gaston (17CRS64058)	New Trial
STATE v. WATKINS 2021-NCCOA-205 No. 20-397	Guilford (18CRS84917) (18CRS84918) (19CRS25280)	New Trial.
WHITE v. ALLSTATE INS. CO. 2021-NCCOA-206 No. 20-483	Wake (19CVS1197)	Reversed and Remanded

BELMONT ASS'N, INC. v. FARWIG

[277 N.C. App. 387, 2021-NCCOA-207]

BELMONT ASSOCIATION, INC., PLAINTIFF
v.
THOMAS FARWIG, AND WIFE, RANA FARWIG AND NANCY MAINARD, DEFENDANTS

No. COA20-350

Filed 18 May 2021

Real Property—covenants—restrictive—improvements—solar panels

The architectural review committee of a subdivision acted within the scope of N.C.G.S. § 22B-20 (generally prohibiting restrictions on solar collectors) in denying defendant property owners' application to install solar panels on the roof of their house. Because defendants' solar panels were to be located on the roof that sloped downward toward the facade of the home facing the public and common areas and were to be clearly visible from the street, the exception in subsection (d) of the statute applied, and the committee was permitted to deny approval based on the solar panels' failure to comport with the aesthetics or common scheme of the development.

Judge JACKSON dissenting.

Appeal by Defendants from order entered 3 January 2020 by Judge Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 9 February 2021.

Jordan, Price, Wall, Gray, Jones & Carlton, PLLC, by Hope Derby Carmichael, Brian S. Edlin, Mollie L. Cozart, for Plaintiff-Appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, and Alexander W. Warner, for Defendants-Appellants.

GORE, Judge.

¶ 1 Thomas Farwig, his wife Rana Farwig, and Nancy Mainard (collectively, "Defendants"), appeal from a trial court's order granting Belmont Association, Inc.'s ("Plaintiff's") Motion for Summary Judgment. On appeal, Defendants argue that the trial court erred in: (1) its application of N.C. Gen. Stat. § 22B-20; (2) concluding that N.C. Gen. Stat. § 22B-20(d) is applicable in this action; (3) finding and concluding that this action involves a covenant or similar binding agreement that prohibits the location of solar panels as described in N.C. Gen. Stat. § 22B-20(b); and

(4) finding and concluding that N.C. Gen. Stat. § 22B-20(c) is not applicable. We affirm the trial court's Order granting Plaintiff's Motion for Summary Judgment.

I. Factual and Procedural Background

¶ 2 On or about 17 December 2012, Defendants purchased Lot 42, also known as 4123 Davis Meadow Street, Raleigh, North Carolina (the "Property"), in the Belmont subdivision of Wake County. The Property is subject to a scheme of restrictive covenants through the recording of a Declaration of Protective Covenants for Belmont (the "Declaration") in December 2011. The Declaration's purpose, among other things, is to establish a general plan and scheme of development for the Belmont residential subdivision, to provide for the maintenance and upkeep of properties, to enforce the Declaration and all covenants and restrictions, and to protect the value and desirability of the properties within its jurisdiction.

¶ 3 The Declaration provides for architectural control and establishes an Architectural Review Committee ("ARC") in Article XI. Pursuant to Section 3(a) of Article XI of the Declaration:

> The [ARC] shall have the right to refuse to approve any Plans for improvements which are not, in its sole discretion, suitable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each Owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

An "Improvement" is defined under Article I, section (bb) of the Declaration:

> as any structure and all appurtenances thereto of every kind and type and any other physical change upon, over, across, above, or under any part of the Properties . . . including any other improvement of, to, or on any portion of the Properties, including Dwellings and other structures (specifically including exterior materials, colors, size, and architectural style of same). Improvements also include . . . equipment and facilities located outside of a Dwelling[,] . . . exterior antennae, dishes and other apparatus

> to receive or transmit radio, television, or microwave or other signals[,] . . . poles, flags, decorative features and items attached to or on the exterior of a Dwelling[,] . . . signs located outside of a Dwelling or visible inside a Dwelling from a street or adjoining portion of the Properties, and all other exterior improvements and items used or maintained on a Lot outside of the Dwelling.

Article I, section (cc) further provides that the word:

> "include" or "including" is defined as being inclusive of, but not limited to, the particular matter described, unless otherwise clearly obvious from the context.

¶ 4 On or about 5 February 2018, Defendants had solar panels installed on the roof sloping towards the front of their home without prior approval from the ARC. Five months later in July 2018, Plaintiff sent Defendants a notice of architectural violation and requested submission of an architectural request form to the ARC. In response, Defendants submitted an architectural request form on 20 July 2018 along with a "Petition to allow solar panels on front of homes in Belmont" signed by 22 members of the community. Plaintiff sent a second notice of architectural violation on 9 August 2018.

¶ 5 On 5 September 2018, Plaintiff denied Defendants' application to install solar panels and acknowledged:

> While the ARC Guidelines do not specifically address solar panels, the ARC committee and the Board has a long standing protocol of making ARC determinations that assure that installations and improvements do not detract from the community aesthetic or property values, and usually deny or require screening of any improvement that can be seen from the street in front of the home. . . . The Declarations of the community allow the ARC the right to refuse to approve any plans or installation which, in its sole discretion, create aesthetic problems (see Article XI, sections 1-3). . . . The Board is issuing a denial of solar panels proposed in this application because the installation can be seen from the road in front of the home, and is not able to be shielded.

¶ 6 On 4 October 2018, Defendants appealed Plaintiff's denial of their application to install solar panels for failure to conform to community aesthetic guidelines. In their appeal, Defendants argued that the ARC's denial of their application violated "NC Gen. Stat. § 22B-20, which provides that an HOA may not regulate the location of rooftop solar having the effect of preventing the reasonable use of the solar system." Specifically, they argue that requiring Defendants to relocate their solar panels "to the back, north-sloping roof would significantly reduce the production of the solar system . . . effectively increasing the cost of owning and maintaining the system beyond reasonable financial means." Defendants submitted a Shade Report along with their appeal to support the necessity of placing the solar panels on the front, south-sloping roof of their home that receives the most sunlight.

¶ 7 On 2 November 2018, Plaintiff considered the appeal and upheld its denial of Defendants' application based on a different subsection of the statute, N.C. Gen. Stat. § 22B-20(d), determining that the front facing solar panels could not be shielded and would be aesthetically unpleasing as viewed from the public street. Plaintiff demanded removal of the solar panels by 7 December 2018.

¶ 8 When the solar panels were not removed, Plaintiff sent Defendants a notice of hearing on 8 January 2019. At the hearing on 30 January 2019, Plaintiff decided to impose a fine of $50.00 per day if the solar panels were not removed after 1 March 2019. Plaintiff began imposing the fines on or about 8 March 2019, with $350.00 added to Defendants' account on that day. On or about 14 March 2019, Defendants began sending payments to Plaintiff, under protest, to cover the imposed fines and keep their Property out of foreclosure.

¶ 9 On 1 April 2019, Plaintiff filed a Claim of Lien alleging $50.00 in debt owed. Plaintiff filed its Verified Complaint on 2 April 2019 seeking (1) Injunctive Relief and (2) Collection of Fines Imposed. On 7 June 2019, Defendants filed an Answer, Counterclaim, and Motion to Dismiss asserting claims against Plaintiff for: (1) declaratory judgment; (2) breach of contract; (3) breach of implied covenant of good faith and fair dealing; (4) slander of title; and (5) violation of N.C. Gen. Stat. § 75-1.1. On 25 July 2019, Plaintiff filed a Motion to Dismiss, Motion for Judgment on the Pleadings, and Reply to the Counterclaim. After the parties exchanged discovery, Plaintiff filed a Motion for Summary Judgment on 5 November 2019.

¶ 10 On 11 December 2019, the Honorable Graham Shirley granted Plaintiff's Motion for Summary Judgment as to Plaintiff's First Claim for Injunctive Relief and Defendants' First Counterclaim for Declaratory

Judgment. In its order, the trial court ruled that: (1) "subsection (d) of N.C.G.S. §22B-20 is applicable" in this action; (2) "this action involves a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in N.C.G.S. §22B-20(b) that are visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces;" and (3) "subsection (c) of N.C.G.S. §22B-20 is not applicable because subsection (d) is applicable." Defendants appeal the trial court's Order granting Plaintiff's Motion for Summary Judgment.

II. Analysis

A. Standard of Review

¶ 11 "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2020). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

B. Statutory Interpretation

¶ 12 The trial court's interpretation of N.C. Gen. Stat. § 22B-20 is directly at issue in this action.

¶ 13 "In matters of statutory construction the task of the Court is to determine the legislative intent, and the intent is ascertained in the first instance from the plain words of the statute." *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005) (citation and quotation marks omitted). "Moreover, we are guided by the structure of the statute and certain canons of statutory construction." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citation omitted). "Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citation omitted).

"To ascertain legislative intent, the courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *Taylor v. City of Lenoir*, 129 N.C. App. 174, 177, 497 S.E.2d 715, 718 (1998) (citation and quotation marks omitted). "Other *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption." *Id.* at 177, 497 S.E.2d at 718 (*purgandum*).

¶ 14 We first look to the plain language of § 22B-20 to guide our review. N.C. Gen. Stat. § 22B-20 regulates deed restrictions and covenants on solar collectors, and provides in pertinent part:

> (a) The intent of the General Assembly is to protect the public health, safety, and welfare by encouraging the development and use of solar resources and by prohibiting deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.
>
> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector . . . for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. . . .
>
> (c) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collectors as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> > (1) On the façade of a structure that faces areas open to common or public access;

> (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or
>
> (3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C. Gen. Stat. § 22B-20 (2020).

¶ 15 It is Defendants' argument that the denial of their application to install solar panels violates N.C. Gen. Stat. § 22B-20(c) because Plaintiff is statutorily prohibited from preventing the reasonable use of solar collectors on their Property. While subsection (d) of § 22B-20 provides an exception and allows restrictive agreements to prevent the installation of solar panels in statutorily prescribed locations, it does not apply in this case because the Declaration does not expressly restrict or prohibit solar collectors as improvements. Further, they argue that subsection (c)'s prohibition on interference with reasonable use should be read as superseding subsection (d)'s exception. We are unpersuaded by Defendants' overly narrow interpretation of §22B-20 and disagree that the statute should be read in nonsequential order.

¶ 16 It is clear from the plain language of §22B-20 that the legislature intended to encourage the use of solar collectors and prohibit agreements that could have the effect of driving up costs of owning and maintaining a residence. It is also clear that the statute presents subsection (d) after subsection (c), and these subsections do not refer to one another. However, there is a degree of ambiguity between the words, "effect of preventing" in subsection (c), and the words, "would prohibit" in subsection (d). We look to the legislative history and the circumstances surrounding the adoption of the Bill itself to ascertain legislative intent.

¶ 17 The first edition of Senate Bill 670 introduced by the General Assembly on 13 March 2007 did not contain the subsection (d) exemption. The second edition of Senate Bill 670 was drafted to include the subsection (d) exemption that allows for a covenant or similar agreement to prohibit the location of solar panels that are visible from the ground in specific places. In addition to introducing the subsection (d) exemption, the second edition of the Bill was recaptioned as follows:

> AN ACT TO PROVIDE THAT CITY ORDINANCES, COUNTY ORDINANCES, AND DEED RESTRICTIONS,

> COVENANTS, AND OTHER SIMILAR AGREEMENTS CANNOT PROHIBIT *OR HAVE THE EFFECT OF PROHIBITING* THE INSTALLATION OF SOLAR COLLECTORS *NOT FACING PUBLIC ACCESS OR COMMON AREAS* ON DETACHED SINGLE-FAMILY RESIDENCES."

2007 N.C. Sess. Laws 520. We find the title of the Bill itself instructive when ascertaining legislative intent.

> The title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered.

State ex rel. Cobey v. Simpson, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992) (*purgandum*). While Defendants assert that a deed restriction, covenant, or similar binding agreement must expressly prohibit the installation of solar collectors under subsection (d), it is clear from the title of the Bill itself that the legislature was specifically addressing agreements that would "have the effect" of prohibiting the installation of solar collectors.

¶ 18 Here, Architectural control is established in Article XI of the Declaration and provides that the Belmont ARC has aesthetic discretion over any improvements made to properties in the community. "[I]t is the general rule that a restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith." *Boiling Spring Lakes Div. of Reeves Telecom Corp. v. Coastal Servs. Corp.*, 27 N.C. App. 191, 195-96, 218 S.E.2d 476, 478-79 (1975) (citation omitted). Defendants are required to apply and receive approval before installing any improvements. Improvements are defined in the Declaration as including various structures and physical changes, but do not expressly list solar panels. However, "Include" and "Including" are also defined in the same section as "being inclusive of, but not limited to, the particular matter described."

¶ 19 While the Declaration does not expressly address solar panels, the architectural review committee has discretionary power that has an "effect of prohibiting" their installation in the statutorily specified areas. Solar panels are an "improvement" within the meaning of the

Declaration, and Defendants were required to apply and receive written approval before installing them. In the ARC's denial of Defendant's appeal letter, it found that the solar panels were plainly on the roof that slopes downward toward the façade of the home facing the public and common areas, and clearly visible from the street. This is a statutorily specified location within the purview of subsection (d). Additionally, the ARC had rejected at least four other applications to install solar panels from other homeowners in the community on the same grounds that they are inconsistent with the plan and scheme of development at Belmont.

> The covenant specifically provides that the ARC is the sole arbiter of the plans and that the ARC can withhold approval for any reason, including purely aesthetic ones. There is no evidence or contention that the covenant was not entered into knowingly and voluntarily. Therefore, the covenant is enforceable according to its terms, at least in the absence of any evidence that the ARC acted arbitrarily or in bad faith in the exercise of its powers.

Raintree Homeowners Ass'n v. Bleimann, 342 N.C. 159, 163-64, 463 S.E.2d 72, 75 (1995).

¶ 20 Here, Defendants installed the solar panels first and sought approval later. Defendants are subject to the Declaration, which provides that the ARC has the sole discretion to deny the installation of improvements to their property that do not comport with aesthetics or the common scheme of development. The ARC does not appear to have acted arbitrarily or in bad faith. It exercised its powers in line with a consistent policy, and within the scope of N.C. Gen. Stat. § 22B-20(d).

III. Conclusion

¶ 21 We find that the trial court did not err in its application of N.C. Gen. Stat. § 22B-20. Subsection (d) of N.C. Gen. Stat. § 22B-20 is applicable in this action because the Declaration has the effect of prohibiting the installation of solar panels "[o]n a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces." § 22B-20(d). Subsection (c) is inapplicable in this case as subsection (d) acts as an exemption to the entire statute. The trial court correctly granted summary judgment for Plaintiff.

AFFIRMED.

Judge COLLINS concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge, dissenting.

¶ 22 Our General Assembly has banned land use restrictions that effectively prohibit the installation of solar panels on residential property—even if those restrictions do not do so expressly. The majority would hold that this statutory ban does not apply here because the restrictions in this case do not explicitly relate to solar panels. Yet this holding ignores precisely what the statutory ban forbids. By reading out of the relevant statute a situation for which the General Assembly made express provision, the majority's interpretation of the law defeats its purpose. I therefore respectfully dissent.

I. Background

¶ 23 This is a case of first impression, but the facts are undisputed.

¶ 24 In 2007 and 2009, the General Assembly passed two laws—Session Laws 2007-279 and 2009-553—related to the validity of land use restrictions prohibiting the installation of solar panels on residential property.[1] With two noteworthy exceptions, these laws invalidate "deed restriction[s], covenant[s], or similar binding agreement[s] that run[] with the land that would prohibit . . . the installation" of solar panels on residential property, and such restrictions that "would . . . have th[is] effect[.]" N.C. Gen. Stat. § 22B-20(b) (2019). There is a specific exemption from the ban for certain multi-story condominiums, *id.*, and a general exception for restrictions on surfaces facing common areas that meet criteria specified in subsection (d) of N.C. Gen. Stat. § 22B-20, which provides:

> This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors . . . that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;

1. These laws are codified in Chapter 22B of the General Statutes, which is entitled "Contracts Against Public Policy." N.C. Gen. Stat. § 22B-1 (2019), *et seq.*

> (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; *or*
>
> (3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

Id. § 22B-20(d) (emphasis added).

¶ 25 On 9 December 2011, Buffaloe Partners I, LLC recorded a Declaration of Protective Covenants ("Declaration") with the Wake County Register of Deeds for a residential subdivision located in Raleigh, North Carolina, known as Belmont. The Declaration authorizes the Belmont Community Association, Inc., ("Plaintiff") "to administer and enforce covenants and restrictions applicable to the [s]ubdivision[.]" The Declaration also establishes an Architectural Review Committee ("Committee"), which is charged with "assur[ing], insofar as is reasonable and practicable, that improvements [to homes in Belmont] are constructed and maintained in a manner that provides for harmony of external design[,]" and that no changes are made to homes in Belmont that would be "deleterious to the aesthetic or property values of any portion of the properties[.]" (Capitalization removed.) The Declaration contains numerous land use restrictions applicable to homes in Belmont, none of which expressly mention solar panels.

¶ 26 In February 2018, Thomas Farwig, an owner of a home in Belmont, had solar panels installed on his roof. The solar panels were installed on a portion of the roof that faces the public street in front of Mr. Farwig's home. Mr. Farwig did not request approval from Plaintiff or the Committee before the solar panels were installed.

¶ 27 In a 16 July 2018 letter, Plaintiff notified Mr. Farwig, his wife Rana Farwig, and Nancy Mainard, the other record owner of the home (collectively, "Defendants") that it considered the installation of the solar panels an "architectural violation," despite the absence of any restriction in the Declaration related to solar panels. Plaintiff requested in the letter that Defendants "complete and submit an Architectural Request form immediately." Plaintiff reiterated this request in a second letter dated 9 August 2018.

¶ 28 Defendants thereafter complied with the request and asked Plaintiff to approve the installation of the solar panels on their roof. However, Plaintiff refused. In a 5 September 2018 letter, Plaintiff explained:

> All [Architectural Review Committee ("ARC")] applications proposed by owners are reviewed on its [sic] visual aesthetic impact to the community and the lot. The Declarations of the community allow the ARC the right to refuse to approve any plans or installation which, in its sole discretion, create aesthetic problems (see Article XI, sections 1-3). This right is granted even though it is acknowledged (in the passage in the Declaration) that this may be subjective.
>
> The Board is issuing a denial of solar panels proposed in this application because the installation can be seen from the road in front of the home, and is not able to be shielded.

The 5 September 2018 denial also stated that any appeal from the decision should be "submit[ted] in writing within 30 days," and should include "specific information clarifying the points raised in the disapproval and justification for reconsideration of [the] request."

¶ 29 In accordance with the terms of the denial, on 4 October 2018, Mr. Farwig appealed and requested reconsideration of the decision. Mr. Farwig argued in his appeal that the denial violated N.C. Gen. Stat. § 22B-20, contending that prohibiting the installation of solar panels on the portion of his roof facing the street effectively constituted a blanket prohibition on the installation of solar panels at his home because shade cover over the portion of his roof not facing the street made any installation there uneconomical. Mr. Farwig also asserted that the presence of solar panels on the roof of a home does not decrease property values. In fact, he contended, not only does the installation of solar panels increase property values, the extent of the increase is not taxable in a North Carolina property tax assessment. Mr. Farwig attached documents to support these claims.

¶ 30 In a 2 November 2018 letter, Plaintiff denied Mr. Farwig's appeal. In the letter, Plaintiff reiterated that Mr. Farwig's initial application had been denied because of the location of the installation, and noted that other Belmont residents had also been denied approval of solar panel installations that would be visible from the street. Plaintiff argued in the denial that subsection (d) of N.C. Gen. Stat. § 22B-20 authorized it "to prohibit solar panels . . . on a roof surface that slopes downward

towards areas open to public access that the dwelling faces." In conclusion, the letter stated that Plaintiff "would favorably consider an application for solar panels that were installed on a rear facing roof."

¶ 31 The denial of Mr. Farwig's appeal gave Defendants a deadline of 7 December 2018 to remove the solar panels. When they did not comply, Plaintiff initiated the present action. After the parties had conducted written discovery, Plaintiff moved for summary judgment.

¶ 32 The trial court granted the motion in a 3 January 2020 order in which it essentially adopted the position of Plaintiff in its denial of Defendants' appeal, concluding that the denial fell within the exception provided by subsection (d) of N.C. Gen. Stat. § 22B-20 because the solar panels at issue were "visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces[.]"

II. Analysis

¶ 33 The plain and unambiguous language of § 22B-20 provides no support for either the narrow proposition that Plaintiff's refusal to approve the installation of Defendants' solar panels falls within the exception created by subsection (d) of the statute, or the broader proposition that the statute does not apply here. Ignoring the plain language of the statute, the majority's holding contravenes the intent of the General Assembly clearly expressed in § 22B-20, relying on a misinterpretation of the statute's legislative history. The majority also construes the Declaration as more restrictive than its terms require. The rule of strict construction that governs the interpretation of restrictive covenants requires the opposite result.

A. Standard of Review

¶ 34 Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The burden is on the moving party to "show that there is no triable issue of fact and that he is entitled to judgment as a matter of law. In deciding the motion, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 391, 594 S.E.2d 37, 40 (2004) (internal marks and citations omitted). We review a trial court's grant of a motion for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

B. The Express Terms of N.C. Gen. Stat. § 22B-20

¶ 35 North Carolina General Statute § 22B-20 provides in relevant part as follows:

> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. As used in this section, the term "residential property" means property where the predominant use is for residential purposes. The term "residential property" does not include any condominium created under Chapter 47A or 47C of the General Statutes located in a multi-story building containing units having horizontal boundaries described in the declaration. As used in this section, the term "declaration" has the same meaning as in G.S. 47A-3 or G.S. 47C-1-103, depending on the chapter of the General Statutes under which the condominium was created.
>
> . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> > (1) On the façade of a structure that faces areas open to common or public access;
> >
> > (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or
> >
> > (3) Within the area set off by a line running across the façade of the structure extending to

> the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C. Gen. Stat. § 22B-20 (2019).

¶ 36 Accordingly, subsection (b) of § 22B-20 invalidates land use restrictions that prohibit the installation of solar panels on residential property, and also invalidates land use restrictions that *effectively* prohibit the installation of solar panels on residential property without doing so expressly. *Id.* § 22B-20(b) ("[A]ny deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, *or have the effect of prohibiting*, the installation of a solar collector . . . is void and unenforceable.") (emphasis added). I would therefore hold that § 22B-20 applies to Plaintiff's refusal to approve the installation of Defendants' solar panels because subsection (b) of the statute invalidates land use restrictions that have the effect of prohibiting the installation of solar panels on residential property, even if the restriction does not explicitly prohibit solar panels.

¶ 37 Subsection (d) of § 22B-20 provides an exception from subsection (b) for restrictions on surfaces facing common areas that meet certain specified criteria, provided that there is an *existing* "deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors . . . that are visible by a person on the ground[.]" *Id.* § 22B-20(d). I would therefore hold that subsection (d) does *not* provide an exception for a land use restriction that *effectively* prohibits the installation of solar panels unless the restriction appears in a pre-existing "deed restriction, covenant, or similar binding agreement that runs with the land" related to "prohibit[ing] the location of solar collectors . . . visible by a person on the ground[,]" as subsection (d) unambiguously provides. *Id.*

¶ 38 In holding otherwise, the majority ignores the words "have the effect of prohibiting" in subsection (b), *id.* § 22B-20(b), while reading these same words into subsection (d), where they do not exist, *id.* § 22B-20(d). Subsection (d) does *not* provide an exception from subsection (b) for restrictions that effectively prohibit the installation of solar panels on residential property in "deed restriction[s], covenant[s], or similar binding agreement[s] that run[] with the land that would prohibit[, or *have the effect of prohibiting*,] the location of solar collectors[.]" The italicized words in the preceding sentence do not exist in subsection (d). They do, however, exist in subsection (b).

C. Legislative Intent

¶ 39 The majority's holding also contravenes the intent of the General Assembly clearly expressed in § 22B-20 and relies on a misinterpretation of the statute's legislative history. I look to the unambiguous words the General Assembly chose to express its intent rather than consulting the legislative history of § 22B-20 to resolve ambiguity where none exists.

¶ 40 The majority correctly notes that the original version of Senate Bill 670—the bill that would become Session Law 2007-279—did not contain subsection (d), and that the title of the bill was changed to include the language "have the effect of prohibiting" after subsection (d) was added. *Belmont Ass'n, Inc. v. Farwig*, *supra* at 393-94. I agree that the title of Senate Bill 670 demonstrates that, in the words of the majority, by enacting Session Law 2007-279 "the legislature was specifically addressing agreements that would 'have the effect' of prohibiting the installation of solar collectors." *Id.* at 394. However, I disagree with the majority's assertion that there is any ambiguity between the words, "effect of preventing" in subsection (b), "and the words, 'would prohibit' in subsection (d)." *Id.* at 393.

¶ 41 "The first consideration in determining legislative intent is the words chosen by the legislature." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) (citation omitted). "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citation omitted).

¶ 42 Reading the words "have the effect of prohibiting" into subsection (d) and out of subsection (b) ignores the deliberate choice made by the General Assembly to use the words "effect of preventing" in subsection (b) of § 22B-20 and *not* in subsection (d), a choice I believe we must presume the legislature carefully made. *See id.* This choice demonstrates that the General Assembly intended for the exception created by subsection (d) to be *unavailable* unless there was an existing "deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors . . . that are visible by a person on the ground[.]" N.C. Gen. Stat. § 22B-20(d) (2019). The majority ignores this choice and reads the exception to swallow the rule.

¶ 43 Moreover, § 3 of Session Law 2007-279 removes any doubt about the intent of the General Assembly, providing:

> [t]he intent of the General Assembly is to protect the public health, safety, and welfare by encouraging

> the development and use of solar resources and by prohibiting deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.

S.L. 2007-279 § 3 (codified at N.C. Gen. Stat. § 22B-20(a)). This provision makes plain that the purpose of the law is to *encourage* the use of solar panels by "prohibiting deed restrictions, covenants, and other similar agreements that *could have the ultimate effect* of driving the costs of owning and maintaining a residence beyond the financial means of most owners." *Id.* (emphasis added). The General Assembly is not often so direct and clear about its intent.

¶ 44 In this case, Plaintiff's effective prohibition of the installation of solar panels on street-facing surfaces in Belmont by enforcing an unwritten rule with the authorization of the covenants in the Declaration is a perfect example of a covenant that discourages the use of solar panels and "that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners." N.C. Gen. Stat. § 22B-20(a) (2019).[2] This scenario—where a delegation of approval by a covenant over certain matters to a body that maintains a practice of prohibiting the installation of solar panels where the covenant itself does not expressly regulate solar panels—is precisely the sort of land use restriction effectively preventing the installation of solar panels that the General Assembly sought to invalidate by enacting Session Law 2007-279. The covenants in the Declaration authorizing this are "covenant[s] . . . that run[] with the land that . . . have the effect of prohibiting[] the installation of a solar collector[.]" *Id.* § 22B-20(b). Thus, under § 22B-20(b), these covenants should be "void and unenforceable." *Id.* As shown by the materials submitted in support of Defendants' appeal of their Architectural Request, the Declaration contains covenants "that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners." *Id.* § 22B-20(a). The General Assembly gave developers subsection (d) so that if they wanted to create covenants with a limited prohibition of solar panels, they could do so by expressly recording the language

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2. As noted previously, N.C. Gen. Stat. § 22B-20 was enacted by the General Assembly in two parts—Session Laws 2007-279 and 2009-553—in 2007 and 2009. Session Law 2007-279 applied only to detached single-family residences. *See* S.L. 2007-279. Session Law 2009-553 expanded the applicability of Session Law 2007-279 to all residential property, defined residential property broadly, and created an exemption for certain multi-unit condominiums. *See* S.L. 2009-553.

of subsection (d) in their restrictive covenants, providing potential buyers with notice of their intention to take advantage of the limited, allowable prohibitions. The Plaintiff in this action failed to take advantage of this safe harbor.

D. The Rule of Strict Construction

¶ 45 Finally, the majority also erroneously construes the Declaration as more restrictive than its terms require, violating the rule of strict construction that governs the interpretation of restrictive covenants. I would adopt the least restrictive construction permitted by the terms of the Declaration, reading it to allow Plaintiff and the Committee to deny approval of installations of solar panels proposed by homeowners in Belmont only if there is first recorded "a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors . . . that are visible by a person on the ground[,]" *id.* § 22B-20(a), and meets at least one of the criteria specified in subsection (d) of § 22B-20.

¶ 46 Generally speaking, while "[r]estrictive covenants are legitimate tools of developers so long as they are clearly and narrowly drawn[,]" *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 735 (2003) (internal marks and citation omitted), they "are not favor[e]d by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land[,]" *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (internal marks and citation omitted). Accordingly, "where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted[.]" *McVicker v. Bogue Sound Yacht Club, Inc.*, 257 N.C. App. 69, 77, 809 S.E.2d 136, 141 (2017) (citation and emphasis omitted). "The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *J.T. Hobby & Son*, 302 N.C. at 71, 274 S.E.2d at 179 (citation omitted).

¶ 47 The majority holds that the Declaration authorizes Plaintiff and the Committee in its "sole discretion to deny the installation of improvements to their property that do not comport with aesthetics or the common scheme of development[,]" ignoring the rule of strict construction. *Belmont Ass'n, Inc. v. Farwig*, *supra* at 395. However, because the terms of the Declaration are capable of a construction that limits rather than extends its applicability, I would hold that the rule of strict con-

struction requires that we construe the Declaration "to the end that all ambiguities [] be resolved in favor of the unrestrained use of land." *J.T. Hobby & Son, Inc.*, 302 N.C. at 70, 274 S.E.2d at 179 (citation omitted).

III. Conclusion

¶ 48 I would hold that N.C. Gen. Stat. § 22B-20(b) applies to Plaintiff's denial of Defendants' Architectural Request because § 22B-20(b) invalidates restrictions that effectively prohibit the installation of solar panels on residential property, even if those restrictions do not do so expressly. I would hold that Plaintiff cannot avail itself of the exception established by subsection (d) of the statute because subsection (d) requires that the restriction prohibiting the installation of solar panels on surfaces facing public areas actually exist in a prior "deed restriction, covenant, or similar binding agreement that runs with the land[.]" N.C. Gen. Stat. § 22B-20(d) (2019). Finally, I would construe the Declaration in favor of less restriction of the free use of land rather than more, as the rule of strict construction for restrictive covenants requires. I therefore respectfully dissent.

WILLIAM E. BENSON, III, AND WIFE, MONIQUE L. RIBANDO, PLAINTIFFS
v.
R. LEE PREVOST, AND WIFE SCHARME S. PREVOST, DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
MICHAEL S. BURNHAM, DANIEL SMITH, AND WIFE, DENISE B. SMITH, THIRD-PARTY DEFENDANTS

No. COA19-962-2

Filed 18 May 2021

1. Easements—right to use driveway—scope—ambiguous—developers' intent—recorded map—reasonable use

In a dispute between neighbors who owned adjacent waterfront lots, where the recorded map referenced in defendants' deed depicted a "driveway easement" over part of plaintiffs' lot for the benefit of defendants' lot but where the map did not clearly define the easement's scope, an examination of the map as a whole—which depicted a very wide easement area located close to defendants' vacation home—the surrounding circumstances showed the land developers intended that the easement include the right to park vehicles there, so long as defendants' vehicles did not block

plaintiffs' access to the side and back gates of their lot. On the other hand, plaintiffs had the right to access the side and back gates by vehicle (not just by foot) in instances when doing so would not interfere with defendants' easement rights.

2. Waters and Adjoining Lands—adjacent waterfront lots—dispute over boat slip ownership—conflict between purchase contract and recorded deeds—pure race recording statute

In a dispute between neighbors who purchased adjacent waterfront lots along a beachside dock leading to three boat slips, where defendants' purchase agreement conveyed exclusive use of the superior boat slip (Slip A) to defendants' lot, but where the land developers had previously recorded deeds and covenants assigning ownership of Slip A to plaintiffs' lot, the trial court's order finding defendants to be the rightful owners of Slip A was reversed. The rights to use the boat slips were part of the littoral or riparian rights associated with the lots, and therefore constituted interests in land subject to the state's pure race recording statute (providing that, as between two purchasers for value, the one whose deed is first recorded acquires title).

3. Attorney Fees—real property dispute—summary judgment reversed—defendants no longer prevailing parties—plaintiffs' claims not frivolous

In a dispute between adjacent property owners, where part of an order granting summary judgment in favor of defendants and the property developers (third-party defendants) was reversed, an order granting costs and attorney fees, pursuant to N.C.G.S. § 6-21.5, to defendants and third-party defendants was also reversed where those parties were no longer prevailing parties in the suit and where the facts did not support the trial court's conclusion that plaintiffs' claims were frivolous and unsupported by good faith arguments for an extension, modification, or reversal of existing law.

Appeal by Plaintiffs from orders entered 25 April 2019, 23 May 2019, and 29 May 2019, by Judge Paul M. Quinn in New Hanover County Superior Court. Heard in the Court of Appeals 25 August 2020. Original opinion filed on 31 December 2020 was withdrawn and Motion to Reconsider granted on 4 March 2021.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., and Elizabeth Brooks Scherer, and Law Offices of G. Grady Richardson, Jr.,

BENSON v. PREVOST

[277 N.C. App. 405, 2021-NCCOA-208]

P.C., by G. Grady Richardson, Jr., and Jennifer L. Carpenter, for Plaintiff.

Shipman & Wright, LLP, by Gary K. Shipman for Defendants.

Block, Crouch, Keeter, Behm, & Sayed, LLP, by Auley M. Crouch, III, for Third-Party Defendants.

DILLON, Judge.

I. Background

¶ 1 This matter involves a real property dispute between next-door neighbors who own two lots within a three-lot subdivision originally developed by Third-Party Defendants (the "Developers"). The Developers developed three adjacent waterfront lots (Lots 1-3) at Wrightsville Beach, along with a dock extending into the water from the lots. The dock leads to three boat slips (Slips A-C). Prior to selling any lot, the Developers filed a map depicting a driveway easement over a portion of Lot 1 for the benefit of Lot 2. The Developers eventually sold each lot, with each lot owner entitled to use a specific boat slip. This matter concerns two disputes between the current owners of Lot 1 and Lot 2 regarding the scope of the driveway easement and ownership of boat slips.

¶ 2 Defendants R. Lee Prevost and Scharme S. Prevost own Lot 2. They purchased Lot 2 from the Developers in 2015. The conveyance included rights to the driveway easement located on Lot 1 and also exclusive use of Slip C. There is evidence that Defendants *thought* they were receiving Slip A. Slip A is the superior boat slip in that it had been improved with a boat lift, whereas Slip C had not.

¶ 3 The following year, in 2016, Plaintiffs William E. Benson and Monique L. Ribando purchased Lot 1 from the Developers.[1] Plaintiffs' interest in Lot 1 was, of course, *subject to* the driveway easement in favor of Defendants as owners of Lot 2. Though Plaintiffs' written contract with the Developers indicated that they would also receive Slip C (the boat slip that the Developers had already, though perhaps inadvertently, conveyed to Defendants the prior year) at closing, Plaintiffs were deeded exclusive use of Slip A, the slip with the boat lift.

1. An affiliate of the Developers actually conveyed Lot 1 to Plaintiffs. In September 2015, a month after selling Lot 2/Slip C to Defendants, the Developers conveyed Lot 1/Slip A to an affiliate entity in anticipation of building the home on Lot 1. This affiliate entity conveyed Lot 1/Slip A to Plaintiffs. However, for ease of reading, the "Developers" refers either to the Developers or its affiliate, depending on the context.

¶ 4 A dispute subsequently arose when Plaintiffs noticed that Defendants were *parking* vehicles within the driveway easement on Plaintiffs' Lot 1 rather than simply using the easement for ingress and egress to Lot 2. Also, a dispute arose regarding which party owned which boat slip.

¶ 5 Plaintiffs brought this action to resolve the two disputes. After a hearing on the matter, the trial court entered summary judgment in favor of Defendants on both issues, concluding that Defendants could park cars within the driveway easement and that Defendants were the rightful owners of Slip A—the better boat slip—notwithstanding the deeds. The trial court also awarded Defendants attorney's fees. Plaintiffs appeal.

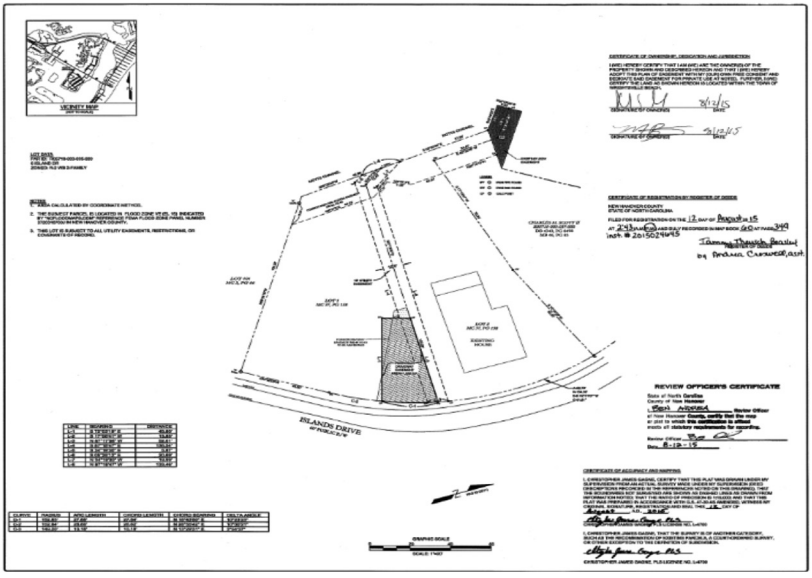
II. Analysis

¶ 6 Summary judgment is appropriate when there is no genuine issue of material fact; and we review a summary judgment order *de novo*. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 186, 835 S.E.2d 411, 415 (2019); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). We address the two property issues and the costs and attorney's fees issue in turn.

A. Driveway Easement

¶ 7 **[1]** The parties dispute the "scope" of the parties' rights to use the driveway easement (the "Easement") located on Lot 1.

¶ 8 In 2015, just prior to conveying any of the lots, the Developers recorded the map below (the "Map"), which depicts the driveway easement shaded on Lot 1.



The recording of this Map did not actually convey anything, as both the dominant estate (Lot 2) and the servient estate (Lot 1) were still held by the same owner.

¶ 9 On 28 August 2015, shortly after the Developers recorded the Map, the Developers conveyed Lot 2 (the lot on the right with an existing home as depicted on the Map) to Defendants. The deed contained the following language, which also granted Defendants rights to the Easement depicted on the recorded Map:

> Together with and subject to a Driveway Easement [located on Lot 1], shown as "Proposed Driveway Easement Area = 1050 S.F." [as recorded on the Map].

¶ 10 At the time Defendants purchased Lot 2, Lot 1 had not yet been developed. The garage area of the existing home on Lot 2 faced (and continues to face) the Easement, as shown in the photographs below. These photos were offered as exhibits at the summary judgment hearing and were taken years later, after Lot 1 had been fully developed. The area depicted as the "Driveway Easement" in these photos does not appear to fully cover the Easement area as depicted on the Map.

¶ 11 In 2016, the Developers constructed a home on Lot 1 and sold it to Plaintiffs. Developers had originally planned to design a home on Lot 1 such that the homeowner would also use the Driveway Easement to access the garage area. However, the Developers ultimately decided on a design with a garage on the other side, opposite the Easement, accessed by a different driveway (unrelated to the dispute). The photos below show that Lot 1, as developed, contains a privacy wall adjacent to the part of the Easement that is now paved, a "back gate" which leads into Lot 1's back yard, and a "side gate" which accesses the home on Lot 1.

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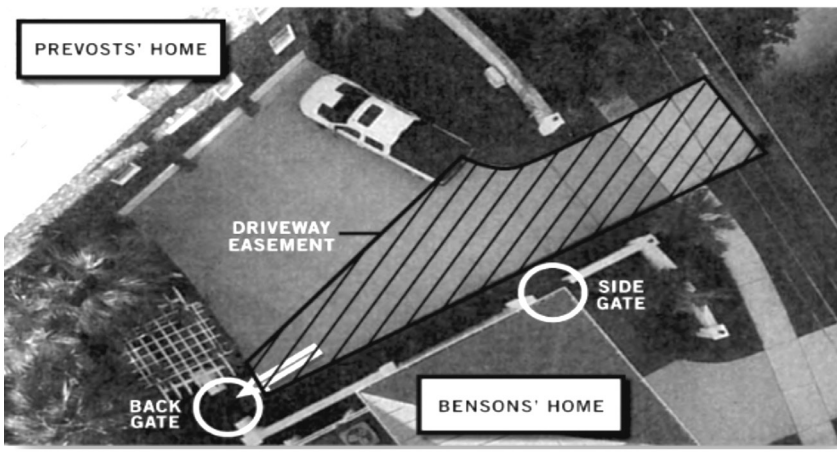

¶ 12 Since purchasing Lot 2 in 2015, Defendants have made use of the Easement to access their garages and parking pad on Lot 2. They have also occasionally parked cars within the Easement. Sometime after purchasing Lot 1, Plaintiffs began protesting Defendants' parking of vehicles within the Easement, contending it blocks their ability to access their back gate. For their part, Defendants contend that Plaintiffs have no right to drive vehicles on the Easement to access the back gate, as this use would interfere with Defendants' Easement rights.

¶ 13 The trial court entered summary judgment in favor of Defendants on this issue. The court determined that Defendants and their successors "are entitled to make reasonable use of the [ ] Easement [as recorded

on the Map]" and that the parking of vehicles is a reasonable use. Further, the trial court determined that Plaintiffs and their successors could only use the Easement to access their side and back gates by foot and not by a vehicle. For the reasons below, we affirm as modified herein.

¶ 14 An easement is an interest in land and is subject to the statute of frauds. *See* N.C. Gen. Stat. § 22-2 (2015). An easement, like any other conveyance, "is to be construed in such a way as to effectuate the intention of the parties *as gathered from the entire instrument*" and not from detached portions. *Higdon v. Davis*, 315 N.C. 208, 215-16, 337 S.E.2d 543, 547 (1985) (emphasis added).

¶ 15 Here, the location of the Easement in favor of Defendants is expressly defined by the Map, referenced in the recorded deed from the Developers to Defendants. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[.]"). When Plaintiffs purchased Lot 1, they took title subject to Defendants' Easement rights as recorded. *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) ("Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title.").

¶ 16 The Map referenced in the Developers' deed to Defendants unambiguously marks *the specific location* of the Easement. The Easement is depicted as the shaded area on Lot 1, adjacent to its shared property line with Lot 2. The Map describes the shaded area to be "Area 1,060 S.F.", which appears to be accurate: the area forms a trapezoid, with the average length from the street being slightly over fifty (50) feet and the average width being slightly over twenty (20) feet. Neither party makes any argument that the location of the Easement is not as described on the Map or has been relocated. *See Cooke v. Electric Membership Corp.*, 245 N.C. 453, 458, 96 S.E.2d 351, 354 (1957). Therefore, the location of the Easement is as described on the Map.

¶ 17 There is no clear language, however, defining *the scope* of Defendants' rights to use the Easement beyond the language labeling the shaded area on the Map as a "Proposed Driveway Easement" and the reference in the deed conveying the Easement rights as a "Driveway Easement."

¶ 18 Our task is to determine whether the intent of the parties regarding the Easement's scope—specifically whether the scope included the right to park vehicles in the Easement—can be gleaned from these recorded instruments. We note that our Court has instructed that if the language in an easement is ambiguous as to its scope:

> [T]he scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant [but that] if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in the latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995). Also, our Supreme Court has instructed that an easement extends to all "uses directly or incidentally conducive to the advancement of the purpose for which the right of way was acquired, and the owner retains merely the title in fee, carrying the right to make such use as in no way interferes with the full and free exercise of the easement." *Light Co. v. Bowman*, 229 N.C. 682, 688, 51 S.E.2d 191, 195 (1949) (citation omitted).

¶ 19 It is unambiguous that the purpose of the easement is to allow Defendants to use the Easement as a "driveway." What is less clear is whether "driveway" use includes the right to park vehicles in the Easement or simply the right to use the driveway for ingress and egress between the public road and Lot 2. There is no express language which restricts the use of the driveway easement for "ingress and egress." We note that many driveways are used by their owners to park cars, while others are used generally only for just ingress and egress.

¶ 20 Looking at the Map *as a whole*, we conclude that the trial court correctly determined that the scope of Defendants' rights includes the right to park vehicles in parts of the Easement area. We are persuaded in large part by the fact that the Easement area, *as defined on the Map*, is on average over twenty (20) feet wide. We are also persuaded by the fact that the Easement is short in length and located immediately adjacent to Defendants' home, as shown on the Map. A narrower driveway easement would suggest an intent by the grantor that its scope be limited to ingress and egress. But the creation of a driveway easement that is approximately twenty (20) feet wide to be used by the owner of a vacation home, especially where the easement is close to the home, suggests an intent that the "driveway" use also include the right to park cars, at least on occasion. This right, though, does not extend to the parking of cars in a way that obstructs the entire width of the Easement *as shown on the Map*, as such use would deprive the owners of the servient estate (Lot 1) of the opportunity to make reasonable use of that part of their property.

¶ 21 There is plenty of room within the Easement *as depicted on the Map* for Defendants to park vehicles and still leave room for Plaintiffs to use the Easement for their ingress and egress to the back part of Lot 1. We note, however, that it *appears* from the photos that *after* conveying Easement rights to Defendants, the Developers placed permanent obstructions within the Easement area, as depicted on the Map, when they developed the house on Lot 1. That is, the easement area as depicted in the photos *appears* smaller than the Easement depicted on the Map. For instance, the boundary at the end of the Easement is depicted on the Map as being approximately fourteen (14) feet long. That boundary as depicted on the aerial photo, though, appears much shorter (comparing it to the width of the truck in the photo). It *appears* from the photos that after conveying Easement rights to Defendants, the Developers built the privacy wall within the Easement, an area the owner of Lot 1 could have used for its own ingress and egress to other portions of Lot 1.

¶ 22 We affirm the trial court's determination that the parking of cars by Defendants in the Easement is generally allowed. Our Supreme Court instructs, though, that "[t]he reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances [and] what is a reasonable use is a question of fact [for a jury]." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963). Therefore, the parking of cars by Defendants in the Easement must be reasonable. And it may be that a jury, for instance, may deem Defendants' parking of cars in the Easement, while leaving the parking pad and garages on Lot 2 vacant, an unreasonable use. (The trial court made no ruling regarding the extent that Defendants may utilize the Easement for parking, as such questions *might* be for a jury to resolve, based on specific facts.)

¶ 23 We modify the trial court's determination regarding Plaintiffs' rights to use the Easement, striking the portion that Plaintiffs may *never* drive a vehicle over the Easement to access the back of their property, but may only use the Easement for pedestrian traffic. To be sure, Plaintiffs may not use the Easement in a way that interferes with the rights of Defendants to use the Easement for ingress and egress and to park vehicles. However, Plaintiffs, as the owners of the servient estate, "may [still] use the land in any manner and for any purpose which does not interfere with the full and free use of the easement[.]" *Harris v. Southern Railway Co.*, 100 N.C. App. 373, 378, 396 S.E.2d 623, 626 (1990). There may be instances where using the Easement for vehicle ingress and egress to access the back or side gate of Lot 1 would not interfere with Defendants' enjoyment of their Easement rights. For instance,

such use may be reasonable during times when Defendants are not parking cars in the Easement area.[2] Accordingly, we reverse that portion of the order and hold that Plaintiffs may use the land in any manner which does not interfere with Defendants' enjoyment of the Easement, which *may* include at times, the right to drive vehicles on the Easement to access their back and side gates.

B. Boat Slips

¶ 24 **[2]** The second issue involves a dispute between Plaintiffs and Defendants as to the ownership of Slip A and Slip C. Though Slip C was deeded to Defendants by the Developers in 2015, Defendants claim that this was a mistake. Defendants do not contend that Plaintiffs, who did not purchase Lot 1 until the following year, knew about the mistake when the Developers "mistakenly" conveyed Slip C to Defendants or that Plaintiffs were otherwise involved at that time. But Defendants do claim, and there is evidence to show, that Plaintiffs came to know that a mistake might have been made when they closed their purchase of Lot 1/Slip A with the Developers.

¶ 25 The timeline relevant to this dispute is as follows:

¶ 26 In July 2015, Defendants entered into a written contract to purchase Lot 2, with exclusive rights to Slip A, the one with the boat lift.

¶ 27 On 25 August 2015, before closing on the sale of Lot 2 with Defendants, the Developers recorded covenants which stated, "Boat Slip A has been made appurtenant to and runs with the land of Lot 1 [and NOT Lot 2] . . . Boat Slip C has been made appurtenant to and runs with the land of Lot 2." This recorded instrument conflicts with the July purchase contract.

¶ 28 Three days later, on 28 August 2015, Defendants closed their purchase of Lot 2 with the Developers. The deed of conveyance provided that Defendants were receiving Lot 2 "[t]ogether with Boat Slip C[,]" which was consistent with the covenants recorded days before, but which conflicted with Defendants' purchase contract. Defendants, though, began using Slip A, the boat slip with a lift, notwithstanding that they had been deeded Slip C.

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2. We note that, assuming the privacy fence is actually within the Easement, Defendants have made no argument or claim that the decision by Plaintiffs' predecessor in title to construct the fence interferes with their ability to use the Easement.

¶ 29 In 2016, the Developers sold Lot 1 to Plaintiffs. There is evidence that before closing, Plaintiffs believed that they were getting Slip C, the inferior slip. However, they came to learn that Developers had already conveyed Slip C to Defendants, though *perhaps* inadvertently. They came to learn that, as a matter of public record, the Developers no longer owned Slip C, but still owned Slip A. But Plaintiffs told the Developers at closing that they wanted to proceed with the closing and "keep the deed [conveying Slip A to them] as it was." Accordingly, the Developers executed a deed conveying Lot 1 to Plaintiffs, together with "the exclusive use of Slip A[.]"

¶ 30 There is evidence that after closing, Plaintiffs made use of the inferior Slip C, as Defendants were already making use of Slip A. However, when Defendants refused to stop parking cars in the Easement, Plaintiffs began protesting that Defendants were using the wrong boat slip.

¶ 31 Plaintiffs brought this action, not only to determine the parties' rights with respect to the Easement, but also for an order declaring them to be the owners of Slip A. The trial court, though, granted summary judgment in favor of Defendants on this issue. For the reasoning below, we reverse the trial court and conclude that Plaintiffs are entitled to the boat slip which was deeded to them by the Developers.

¶ 32 With the passage of the Connor Act in 1885, our General Assembly made North Carolina a pure race state. N.C. Gen. Stat. § 47-18(a) (2015). Under our pure race recording statute, "[a]s between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title." *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965).

¶ 33 There is evidence that there were conversations about the "flipped" boat slips between the attorneys for Plaintiffs and the Developers prior to closing, and that they agreed to "straighten out" the boat slip issue later. When Plaintiffs were closing their purchase of Lot 1 in 2016, they were aware that the Developers had intended to convey Slip A to Defendants the prior year, but there was no deed in the Developers' chain of title to indicate that they had yet parted with Slip A. For their part, Defendants had not filed any litigation—which could have included the filing of a notice of *lis pendens*—to reform their deed from the Developers, something they could have done to protect their interests. *See Hill v. Pinelawn Memorial Park, Inc.*, 304 N.C. 159, 163, 165, 282 S.E.2d 779, 782, 783 (1981) (finding "[i]f [a purchaser] finds no record of [a prior conveyance], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will

prevail" and "[w]hile actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status."); *see also Rollins v. Henry*, 78 N.C. 342, 351 (1878) ("When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action[.]"). Defendants argue that they had no knowledge of the error in the deed before Plaintiffs told them after Plaintiffs' closing; however, they were on constructive notice as the covenants were recorded by the Developers days prior to Defendants' closing and deed recording.

¶ 34 Defendants argue that boat slips, themselves, are not interests in real estate and, therefore, not subject to the Connor Act. We disagree. It is true that the land *under* navigable waters in North Carolina—including the land under which Plaintiffs' and Defendants' boats are situated when tied to the dock—belong to the State of North Carolina. *See Miller v. Coppage*, 261 N.C. 430, 435, 135 S.E.2d 1, 5 (1964). But an interest in land that abuts navigable water—such as Lots 1 and 2—includes certain littoral or riparian rights to that navigable water. *See Jones v. Turlington*, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956). These rights may include the right to construct docks, piers, and the like from one's land to access the water which might otherwise interfere with the public's right to use some portion of the navigable water adjacent to the owner's land:

> [A] littoral proprietor and a riparian owner, as is universally conceded, have a *qualified property* in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being *the right of access* over an extension of their water fronts to natural water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature . . . may prescribe for the protection of public rights in rivers or navigable waters.

Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (citations and quotation marks omitted).

¶ 35 In the present case, the Developers, prior to conveying Lots 1 and 2, constructed a dock, including three slips from which boats could access the dock, in the exercise of their riparian rights to their land. The Developers then subdivided their land and the rights to access the dock.

The Developers conveyed Lot 2 with the right to access the dock at Slip C to Defendants, thereby retaining Lot 1 and the right to access the dock at Slip A. The Developers subsequently conveyed Lot 1, which included the Developers' remaining riparian rights to access the dock at Slip A. As such, we hold that the ownership of each boat slip (which includes the right to access the dock at a certain point) is part of the littoral or riparian rights associated with the Lots and is therefore an interest in land subject to the Connor Act.

¶ 36 Additionally, Defendants argue that the Connor Act does not apply because Plaintiffs did not purchase their rights to Slip A for value. Indeed, the Conner Act protects lien creditors and "purchasers for a valuable consideration." N.C. Gen. Stat. 47-18. However, the record shows that Plaintiffs paid $1.9 million for Lot 2, including use of Slip A. For instance, the deed from the Developers shows revenue stamps reflecting that this price was paid. The parties conceded this point, and there is nothing to indicate that Slip A was given to them. At the very least, Plaintiffs gave up their "right" to receive Slip C at closing (that they had originally been promised) to receive Slip A, and Slip C has significant value. *King v. McRacken*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) ("The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing!' ").

¶ 37 We are unpersuaded by the Developers' argument which relies on their evidence that Plaintiffs orally promised that they would trade boat slips after their closing, to correct the mistake made when the Developers conveyed the wrong slip to Defendants the year before. The evidence is conflicting. The Developers could have required Plaintiffs to enter some express *written* agreement to make the transfer, but they did not. Defendants could have protected themselves by filing an action against the Developers and then giving notice to the public (including Plaintiffs) of such pending action by recording a notice of *lis pendens* prior to Plaintiffs' purchase of Lot 1/Slip A, ten (10) months later, but they did not. All we have are allegations of verbal representations.

C. Costs and Attorney's Fees[3]

¶ 38 **[3]** Finally, Plaintiffs appeal the award of costs and attorney's fees to Defendants and the Developers. As we have reversed the trial court's

3. The trial court has not entered any order on Plaintiffs' request for attorney's fees in accordance with N.C. Gen. Stat. § 6-21.5 (2015) and nothing in this opinion should be interpreted as a forecast by this Court.

order granting summary judgment in favor of Defendants and the Developers on the issue of the boat slips, we must reverse the trial court's order granting these parties costs and attorney's fees as they are no longer a prevailing party. Further, the trial court awarded attorney's fees under N.C. Gen. Stat. § 6-21.5 finding, *inter alia*, that Plaintiffs "knew, or reasonably should have known, that there was a complete absence of a justiciable issue of either law or fact raised by them in their verified complaint[;]" "[t]here was a complete absence of a justiciable issue by the Plaintiffs in this case[;]" "Plaintiffs' claims in this case were frivolous[;]" and "not supported by a good faith argument for an extension, modification or reversal of existing law." To the extent these are findings of fact and not conclusions of law, they are not supported.

¶ 39 Further, the trial court's conclusions of law that: "Plaintiffs' claims in this case were frivolous[;]" "contained no justiciable issue[;]" "Plaintiffs persisted in litigating this case after the point when they and/or their counsel knew or should have known that their Complaint no longer contained a justiciable issue[]" and "were not supported by a good faith argument for an extension, modification or reversal of existing law" are not supported by the facts in this case. Nothing in this case or the arguments of counsel for either side can be considered "frivolous" or "not supported by a good faith argument for an extension, modification or reversal of existing law." We reverse the trial court's award of costs and attorney's fees.

III. Conclusion

¶ 40 This matter concerns a recorded driveway easement and interests in boat slips between next door neighbors who never entered into a contract with each other, but who purchased their lots/slips from a common owner. There is conflicting evidence about what might have been said at various times regarding these instruments, but we must remember:

> There is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land-title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.
>
> The infirmity of memory . . . the honest mistakes of witnesses, and the mis-understanding of parties,

> these are all elements of confusion and discord which ought to be excluded[.]

Moore v. Small, 19 Pa. 461, 465 (1852).

¶ 41 Here, regarding the Easement, we affirm in part and reverse in part. Defendants may make reasonable use of the Easement, which may include the parking of cars within the Easement area. Plaintiffs may make use of the Easement that does not interfere with Defendants' rights to the Easement. This use may include, at times, the right to use the Easement for ingress and egress by vehicles.

¶ 42 Regarding the boat slips, we reverse, specifically the portion of the order directing that the deeds conveying Slip A to Plaintiffs and Slip C to Defendants be reformed. We conclude that Plaintiffs' interest in Slip A is superior to Defendants' claim.

¶ 43 Regarding the costs and attorney's fees, we reverse. Defendants are not the prevailing party, such that they are entitled to attorney's fees, and neither party has brought or maintained a frivolous argument.

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART.

Judges MURPHY and WOOD concur.

C INVESTMENTS 2, LLC, PLAINTIFF
v.
ARLENE P. AUGER, HERBERT W. AUGER, ERIC E. CRAIG, GINA CRAIG, LAURA DUPUY, STEPHEN EZZO, JANICE HUFF EZZO, ANNE CARR GILMAN WOOD, AS TRUSTEE OF THE FRANCIS DAVIDSON GILMAN, III TRUST FBO PETS UW DATED JUNE 20, 2007, LAUREN HEANEY, BRIDGET HOLDINGS, LLC, GINNER HUDSON, JACK HUDSON, CHAD JULKA, SABRINA JULKA, ARTHUR MAKI, RUTH MAKI, JENNIE RAUBACHER, MATTHEW RAUBACHER, AS CO-TRUSTEES OF THE RAUBACHER/CHEUNG FAMILY TRUST DATED NOVEMBER 11, 2018, LAWRENCE TILLMAN, LINDA TILLMAN, ASHFAQ URAIZEE, JABEEN URAIZEE, JEFFREY STEGALL AND VALERIE STEGALL, DEFENDANTS

No. COA19-976

Filed 18 May 2021

Real Property—Real Property Marketable Title Act—exception under section 47B-3(13)—covenants restricting property to residential, single-family, or multi-family use—covenants restricting number or type of structure on property

In a declaratory judgment action regarding residential subdivision lots subject to covenants from the 1950s, where the first covenant restricted the lots to residential use only while the remaining covenants governed the number, size, location, and type of structures permitted on each lot, the trial court correctly determined that only the first covenant survived under the Real Property Marketable Title Act (which, once a landowner establishes a thirty-year chain of marketable title, extinguishes any covenants existing before that thirty-year period). The exception found in N.C.G.S. § 47B-3(13)—which preserves covenants applicable to a general or uniform scheme of development that restricts property to residential "use," or more narrowly to multi-family or single-family "use"—did not apply to the remaining covenants, including those allowing only one single-family structure on each lot, because those covenants did not limit how those structures could be used.

Judge DILLON concurring in part and dissenting in part with separate opinion.

Appeal by defendants from judgment entered 8 April 2019 by Judge Charles M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2020.

Parker Poe Adams & Bernstein LLP, by Michael G. Adams and Morgan H. Rogers, for plaintiff-appellee.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies, for defendants-appellants Arlene Auger, Herbert Auger, Eric Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee.

Tillman Wright, PLLC, by Chad D. Tillman and Jeremy C. Doerre, for defendants-appellees Lawrence and Linda Tillman.

Jordan Price Wall Gray Jones & Carlton PLLC, by H. Weldon Jones, III, for amicus curiae Community Associations Institute.

Offit Kurman, P.A., by Zipporah Basile Edwards, for amicus curiae North Carolina Land Title Association.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies; Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot; and Nexsen Pruet, PLLC, by James C. Smith, for amici curiae C.E. Williams, III, et al.

Offit Kurman, P.A., by Amy P. Hunt and Robert B. McNeill, for amici curiae Michael and Karyn Reardon.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Andrew D. Irby, for amicus curiae Lori Postal.

Ball Barden & Cury P.A., by J. Boone Tarlton, and Roberts & Stevens, P.A., by Kenneth R. Hunt, for amici curiae Daniel Kayser et al.

DIETZ, Judge.

¶ 1 For much of our State's history, a title search in North Carolina was a costly, often risky endeavor. Buyers—typically through their real estate attorneys—had to carefully comb back through deeds and other property records, sometimes going back for centuries, to ensure they found every recorded interest in the property, including things like easements and restrictive covenants attached to the land.

¶ 2 In the early 1970s, our State enacted the Real Property Marketable Title Act to simplify these title searches and reduce the costs they imposed on our society. Now, if a property owner has an unbroken chain of title dating back thirty years, earlier rights and interests in the land are extinguished, barring a few narrow exceptions.

¶ 3 This case involves one of these statutory exceptions. The Marketable Title Act does not extinguish a covenant that is part of a scheme of development and that restricts the property to residential use only, or more narrowly to multi-family or single-family residential use only.

¶ 4 The parties in this case own property in a residential subdivision created in the 1950s. The lots are subject to a restrictive covenant limiting them to residential use only, as well as a number of other covenants that govern the number, size, location, and various design elements of structures located on each lot. The trial court entered a declaratory judgment holding that only the first covenant—the one restricting the properties to residential use—survives under the Marketable Title Act and that the remaining challenged covenants were extinguished.

¶ 5 We affirm the trial court's order. Applying the plain and unambiguous language of the Act, the covenants governing the type of structures that can be erected on the property, where they are located, and what they look like are not covenants concerning residential use or, more narrowly, multi-family or single-family residential use. This is confirmed by long-standing precedent from our Supreme Court interpreting language in covenants nearly identical to those at issue in this case.

¶ 6 Defendants urge this Court to depart from the Act's plain language—to, in essence, rewrite the statute—because, in their view, our General Assembly could not have intended this result. This is so, Defendants argue, because following the Act's plain language would destroy the character of many older neighborhoods that have long been governed by these types of aging restrictive covenants.

¶ 7 What Defendants ask of us is beyond the role of the judicial branch. We interpret statutes as they are written; we do not rewrite statutes to ensure they achieve what we believe is the legislative intent. If our interpretation of the plain language of a statute yields unintended results, the General Assembly can amend the statute to ensure it achieves the intent of the legislative branch of our government.

Facts and Procedural History

¶ 8 Country Colony is a residential subdivision in Mecklenburg County developed in the 1950s. In 1952, before selling any lots, the developer

recorded nine restrictive covenants. The covenants limit the properties to residential use only and provide further restrictions on the number, size, location, and design elements of the structures located on each lot:

1. All lots in the tract shall be known and described and used for residential lots only.

2. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage, and other outbuildings incidental to residential use of the plot.

3. No building shall be erected on any residential building plot nearer than 100 feet to the front lot line nor nearer than 20 feet to any side line.

4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

5. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.

6. No dwelling costing less than $10,000.00 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and open car ports, shall be not less than 1200 square feet in case of a one story structure. In the case of a one and one-half, two or two and one-half story structure, the ground floor area of the main structure, exclusive of one-story open porches or open car ports, shall not be less than nine hundred square feet. (It being the intention to require in each instance the erection of such a dwelling as would have cost not less than the minimum cost provided if same had been erected in January, 1952.)

7. A right of way is and shall be reserved along the rear of each lot and along the side line of each

> lot where necessary, for pole lines, pipes and conduits for use in connection with the supplying public utilities service to the several lots in said development.
>
> 8. In the event of the unintentional violation of any of the building line restrictions herein set forth, the parties hereto reserve the right, by and with the mutual written consent of the owner or owners, for the time being of such lot, to change the building line restrictions set forth in this instrument; provided, however, that such change shall not exceed ten percent of the original requirements of such building line restrictions.
>
> 9. None of the lots shown on said plat shall be subdivided to contain less than two acres, and only one residence shall be erected on each of said lots.

¶ 9 Plaintiff is the owner of seven of the lots. Defendants are the owners of the other lots. Plaintiff brought a declaratory judgment action seeking to extinguish many of these covenants based on our State's Marketable Title Act. The trial court entered summary judgment declaring that the first covenant, which restricts the lots to residential use, is enforceable but the remaining covenants challenged by Plaintiff are extinguished by operation of the Marketable Title Act. Defendants appealed.

Analysis

¶ 10 Under the common law, owners of real property acquired and held title to their real property subject to any covenants and other nonpossessory interests that appeared in their property's chain of title. As a result, owners and prospective owners of real property, typically through their real estate attorneys, were required to trace the title to property back for centuries to ensure all enforceable interests in that property were identified. This was often a complicated and time-consuming process that injected significant cost, delay, and uncertainty into our State's real property market.

¶ 11 In 1973, our General Assembly passed the Real Property Marketable Title Act to simplify title searches and render our State's real estate more marketable. *See* N.C. Gen. Stat. § 47B-1 *et seq*. The Marketable Title Act functions by creating "marketable record title" to real property upon a showing of an unbroken, thirty-year chain of title to real property.

Hill v. Taylor, 174 N.C. App. 415, 420–21, 621 S.E.2d 284, 288–89 (2005). Once the owner establishes marketable record title, the Act extinguishes "all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30–year period," including restrictive covenants like the ones at issue in this case, unless those restrictive covenants fall within the exceptions to the Act contained in Section 47B-3. *Id.* (citing N.C. Gen. Stat. §§ 47B-2(c), 47B-3).

¶ 12 The crux of this case is the proper interpretation of one of the exceptions in Section 47B-3, which provides that the Act does not extinguish a covenant applicable to a general or uniform scheme of development which restricts the property to residential use, or more narrowly to multi-family or single-family residential use:

> Such marketable record title shall not affect or extinguish the following rights:
>
> . . .
>
> (13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B.

N.C. Gen. Stat. § 47B-3(13).

¶ 13 The trial court declared that the first challenged covenant, providing that all "lots in the tract shall be . . . used for residential lots only" fell within the exception of Section 47B-3(13) and was not extinguished. The court declared that the other challenged covenants—those restricting the size and number of structures erected on lots, establishing setbacks on the property, barring further subdivision of lots, and imposing various other architectural limitations on structures built upon the lots—did not fall within Section 47B-3(13) and were extinguished under the Act.

¶ 14 On appeal, Defendants contend that the trial court erred in its interpretation of N.C. Gen. Stat. § 47B-3(13) and that all of the challenged covenants survive under this exception to the Marketable Title Act. We thus begin our analysis by interpreting the language of N.C. Gen. Stat. § 47B-3(13).

¶ 15 "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Lemus*, 273 N.C. App. 155, 159, 848 S.E.2d 239, 242 (2020). "But, if the statutory language is clear and unambiguous, then the statutory analysis ends and the court gives the words in the statute their plain and definite meaning." *Id.*

¶ 16 Defendants argue that, under N.C. Gen. Stat. § 47B-3(13), if a collection of covenants governing a uniform scheme of development include a restriction on residential use only, the Marketable Title Act exempts *all* covenants applying to that uniform scheme of development. This is so, Defendants argue, because the phrase "which restrict the property to residential use only" modifies the immediately preceding phrase "general or uniform scheme of development":

> (13) Covenants *applicable to a general or uniform scheme of development which restrict the property to residential use only*, provided said covenants are otherwise enforceable. . . .

N.C. Gen. Stat. § 47B-3(13) (emphasis added).

¶ 17 The flaw in this argument is that the verb "restrict" is in its plural form, which means that, in the phrase "Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only," the phrase "which restrict" is modifying the plural "covenants" and not the singular "scheme of development." We thus reject Defendants' proposed interpretation and hold that this exception in N.C. Gen. Stat. § 47B-3(13) applies only to "covenants . . . which restrict the property to residential use only" and not to other covenants that are part of a general or uniform scheme of development and merely accompany a covenant restricting the property to residential use only.

¶ 18 Defendants next argue that, even if the statute applies only to "covenants . . . which restrict the property to residential use only," that phrase should be read broadly to include accompanying covenants *relating to* the residential use of the property, such as those governing the size and number of structures erected on lots and imposing various architectural limitations on structures built upon the lots.

¶ 19 But again, this proposed interpretation cannot be squared with the statute's plain language. The next two sentences of N.C. Gen. Stat. § 47B-3(13) further define the types of covenants that are subject to the statutory exception and expressly state that the exception is limited *solely* to those covenants restricting property to residential use, or more

narrowly to multi-family or single-family residential use, and that it does *not* apply to other, related covenants:

> (13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. *The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B.*

Id. (emphasis added).

¶ 20 By stating that the excepted covenant "may restrict the property to multi-family or single-family residential use or simply to residential use," the statute indicates that it applies solely to these specific covenants, not to other, related ones that might accompany these specific covenants as part of a uniform scheme of development. Defendants' proposed interpretation would render the second sentence superfluous by broadening the exception for residential use to include many other forms of covenants.

¶ 21 The same is true of the third sentence, which again expressly indicates that the statute should *not* be read broadly and that it excepts only those covenants "which limit the property to residential use." *Id.* This language, too, would be superfluous if we adopted Defendants' proposed interpretation. Settled principles of statutory construction require us to follow a statute's plain language and avoid interpretations that render meaningless the words chosen by our legislature. *State v. Beck*, 359 N.C. 611, 614–15, 614 S.E.2d 274, 277 (2005).

¶ 22 The dissent also contends that, by using the phrase "general or uniform scheme of development," the General Assembly signaled that this provision might exempt covenants concerning how a planned community is developed, not merely how the properties within it are used. Thus, the dissent reasons, the phrases "residential use" and "multi-family or single-family residential use" are ambiguous and can be read more broadly than their plain language requires. But the limiting phrase "general or uniform scheme of development" serves a plain and unambiguous purpose: it restricts the exemption to these sorts of planned communities and not to a covenant attached only to a single property. There is nothing ambiguous about this statutory language.

¶ 23 Accordingly, we reject Defendants' arguments and hold that the exception in Section 47B-3(13) applies only to covenants applicable to a general or uniform scheme of development that either restrict the property to residential use only, or more narrowly restrict the property to multi-family or single-family residential use only.

¶ 24 Having interpreted this provision of the Marketable Title Act, we turn to its application in this case. We agree with the trial court that the first covenant, stating that all "lots in the tract shall be . . . used for residential lots only" survives under the Marketable Title Act. The parties concede that all of the challenged covenants are ones applicable to a general or uniform scheme of development. This particular covenant restricts the properties to residential use only. It is therefore excepted from extinguishment under the Marketable Title Act by the plain terms of Section 47B-3(13).

¶ 25 We likewise agree with the trial court that the remaining challenged covenants are not subject to the exception in Section 47B-3(13) and are extinguished. Most of the provisions in these covenants quite plainly fall outside the exception: the setback requirements, the restrictions on subdividing lots, and the various architectural limitations. None of these provisions restrict the property to residential use, or more narrowly to multi-family or single-family residential use, and therefore are extinguished.[1]

¶ 26 Two remaining provisions in the challenged covenants merit further analysis: (1) the provision that "No structure shall be erected, altered, placed or permitted . . . other than one detached single-family dwelling" and (2) the provision that "only one residence shall be erected on each of said lots." Defendants contend that these two restrictions, in effect, limit the property to single-family use. But again, Defendants' argument cannot be squared with the language carefully chosen by our General Assembly.

¶ 27 The General Assembly could have stated that covenants restricting property to single-family or multi-family *use* and covenants restricting property to single-family or multi-family *structures* both survive under the Marketable Title Act. But that is not what the legislature said. The Act does not save covenants addressing the *type of*

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1. The Marketable Title Act contains other exceptions, some of which arguably could apply to certain covenants challenged in this case, such as the seventh covenant concerning a right of way for utility lines, pipes, and conduits for public utilities. The parties in this appeal addressed only the exception in N.C. Gen. Stat. § 47B-3(13) and we therefore limit our appellate review solely to those arguments. *See* N.C. R. App. P. 28(b)(6).

structure on property; it saves only those covenants restricting how that structure is *used*:

> Such marketable record title shall not affect or extinguish the following rights:
>
> . . .
>
> (13) Covenants applicable to a general or uniform scheme of development *which restrict the property to residential use only*, provided said covenants are otherwise enforceable. *The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. . . .*

N.C. Gen. Stat. § 47B-3(13) (emphasis added).

¶ 28 Turning to the covenant barring any structure "other than one detached single-family dwelling," we conclude that this covenant restricts the type of structure erected on the property and says nothing about how that structure is used.

¶ 29 We know this because our Supreme Court has held it. *See J. T. Hobby & Son, Inc. v. Fam. Homes of Wake Cty., Inc.*, 302 N.C. 64, 74–75, 274 S.E.2d 174, 181 (1981). In *Hobby*, there were two relevant covenants governing the residential subdivision in the case: one stating that no lot "shall be used except for residential purposes" and another stating that no "building shall be erected . . . other than one detached single-family dwelling." *Id.* at 65–66, 274 S.E.2d at 176. The defendants, who operated a family care business, bought a home in the subdivision and converted it for multi-family use by four special needs adults and their care staff. *Id.* at 72, 274 S.E.2d at 179–80. The Supreme Court held that this was consistent with both covenants: the family care home was used for residential purposes, thus complying with the first covenant, and the building itself was a single-family dwelling, thus complying with the second covenant. *Id.* at 74–75, 274 S.E.2d at 181. Critically important for this case, the Supreme Court held that the covenant's language restricting the property to "one detached single-family dwelling" did not limit the *use* of that dwelling to a single family. *Id.*

¶ 30 Here, too, a resident of this subdivision could convert their single-family dwelling for multi-family use without running afoul of the language in this covenant. The covenant restricts the property to one "detached single-family dwelling," a restriction on the structure. It does not "restrict the property to multi-family or single-family residential use

or simply to residential use." N.C. Gen. Stat. § 47B-3(13). So, under the plain terms of the Marketable Title Act, it is extinguished.

¶ 31 We next turn to the covenant stating that "only one residence shall be erected on each of said lots." Again, this covenant governs how many structures can be erected on a lot, not how they are used. And, again, we know this because our Supreme Court has held it. *Huntington v. Dennis*, 195 N.C. 759, 760–61, 143 S.E. 521, 521–22 (1928). In *Huntington*, the Court held that an apartment complex with many separate apartments is a single "residence" for purposes of a covenant stating that "[a]ny residence erected on the property shall cost not less than $7,500." *Id*. The covenant in this case stating that "only one residence shall be erected on each of said lots," like the similar covenant in *Huntington*, only restricts the number of structures erected on the property; it does not restrict whether that structure is for single-family or multi-family use.

¶ 32 Defendants urge this Court to ignore the statute's plain language because applying that plain language to these two covenants "would destroy the common scheme of development for Country Colony, stripping the neighborhood naked, with only the 'fig leaf' of the residential use covenant." This, Defendants contend, "could not have been the intent of the legislature, or it would, and could, have said so expressly."

¶ 33 This reasoning reveals the ultimate flaw in Defendants' argument—the legislature did say so expressly, in the words they chose when they crafted the statute. The role of the courts is to interpret statutes as they are written. We do not rewrite statutes to ensure they achieve what we, or the parties in a lawsuit, imagine are the legislature's policy goals. *Sykes v. Vixamar*, 266 N.C. App. 130, 138, 830 S.E.2d 669, 675 (2019).

¶ 34 Now, to be sure, if the plain reading of a statute leads to a result so absurd that no reasonable legislator could have intended it, we can ignore that absurd interpretation and find a reasonable one. *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979). But the plain language of the Marketable Title Act is not absurd. There are countless reasons why rational legislators might have wanted to preserve restrictions on use but not restrictions on structure—not least of which is that the original proposal for our State's Marketable Title Act might have included exemptions for both structure and use, but the General Assembly only had the votes to enact a bill focusing on use.

¶ 35 And even if we, as judges, agreed with Defendants that the legislature might have intended something other than what the plain language provides, we would still follow the statute's language. As this Court suc-

cinctly explained in a similar dilemma several years ago, we have "two choices: (1) we can apply the plain language and settled canons of statutory construction, which results in a statutory interpretation that the legislature may not have intended; or (2) we can interpret the statute in the way we, as judges, *think* the legislature intended, which may also result in a statutory interpretation that the legislature may not have intended." *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 287, 791 S.E.2d 906, 911 (2016). "The choice," as we held in *Wells Fargo*, "is obvious." *Id.* "We will not speculate about what we think the legislature intended; we will apply the plain language and applicable statutory canons and, if the result is unintended, the legislature will clarify the statute." *Id.*

¶ 36 The dissent also emphasizes that courts do not construe statutes in favor of unrestricted use of land, as we are required to do with covenants. This is correct; we construe statutes by examining the words of the statute. The dissent struggles to understand why our General Assembly chose the words it used—in particular, the words "residential use" and "multi-family or single-family residential use." But our task is not to speculate about why the legislature chose particular words, but to interpret those words according to their plain meaning and ordinary usage. *Raleigh Hous. Auth. v. Winston*, 2021-NCSC-16, ¶ 8. The dissent also suggests that the Supreme Court, by affirming the dissent in *Winding Ridge*, held that the words "residential use" and "multi-family or single-family residential use" are ambiguous. But *Winding Ridge* holds precisely the opposite—that there is nothing ambiguous about words "restricting the type of occupancy or use that may be made of the dwelling." *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 362 N.C. 225, 657 S.E.2d 356 (2008), *reversing for reasons in dissent*, 184 N.C. App. 629, 640, 646 S.E.2d 801, 808 (2007). The ambiguity in *Winding Ridge* arose because the covenants' headings purported to address "Use Restrictions" and "Use of Property," but the covenants themselves focused "exclusively on construction and other structural concepts" and not on use. *Id.*

¶ 37 Finally, our analysis, unlike that of both Defendants and our dissenting colleague, is consistent with the stated intent of the Act. The General Assembly explained in the Act that "Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable"; that "Nonpossessory interests" in real property "often constitute unreasonable restraints on the alienation and marketability of real property"; and that "Such interests . . . are prolific producers of litigation to clear and quiet titles which

cause delays in real property transactions and fetter the marketability of real property." N.C. Gen. Stat. § 47B-1. Then, the legislature declared that the Act "shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3." *Id.* § 47B-9.

¶ 38 So a key stated purpose of the Marketable Title Act is to make it easy for anyone buying real property to know precisely what covenants and other nonpossessory restrictions are, and are not, attached to the property. This, in turn, encourages the marketability of our State's real property. Defendants' interpretation would do the opposite. If we adopted Defendants' strained interpretation, real property purchasers could not be certain what they were getting. There would be a chance that some judge out there somewhere could be persuaded that a covenant, even if not covered by the Act's plain language, was close enough to survive. There would be "prolific producers of litigation" and "delays in real property transactions" and burdens on "the marketability of real property." *Id.* § 47B-1. There would be everything the legislature expressly set out to prevent.

¶ 39 Simply put, we reject Defendants' (and the dissent's) invitation to trek into the minds of the legislature and rewrite the statute. The Marketable Title Act is clear and unambiguous. Under N.C. Gen. Stat. § 47B-3(13), the covenants that survive are those "applicable to a general or uniform scheme of development" that "restrict the property to multi-family or single-family residential use or simply to residential use." That's it. Anything else is gone.

¶ 40 This means, as the trial court properly held, that the only covenant in this case that survives is the first one, stating that all "lots in the tract shall be . . . used for residential lots only." The other challenged covenants are extinguished.

Conclusion

¶ 41 We affirm the trial court's judgment.

AFFIRMED.

Judge INMAN concurs.

Judge DILLON concurs in part and dissents in part with separate opinion.

DILLON, Judge, concurring in part, dissenting in part.

¶ 42 The appeal concerns Country Colony's thirteen (13) private restrictive covenants. But we are not being asked to interpret those covenants; there is no argument between the parties as to *their* meaning. Rather, we are called upon to interpret a provision in our General Statutes, specifically N.C. Gen. Stat. § 47B-3(13) (2018), a provision that excepts certain private restrictive covenants from being extinguished by operation of our Real Marketable Title Act. This provision saves from the Act's operation:

> Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B.

N.C. Gen. Stat. § 47B-3(13).

¶ 43 I agree with the majority that this statutory provision saves the first private restrictive covenant at issue in this case, which states that the lots in Country Colony "shall be . . . used for residential lots only."

¶ 44 But, unlike the majority, I also conclude that the statutory provision— specifically the portion of the second sentence which saves private covenants which "restrict the [burdened] property to . . . single-family residential use"—covers the portions of Country Colony's second and ninth covenants, *which restrict the use of each lot to a single-family residential structure*. In other words, I conclude that the above statutory language describes both structural covenants and occupancy covenants; that is, occupancy covenants which limit the use of property to occupancy by a single family *and* structural covenants which limit the use of property to the development of a single-family type residential structure. Accordingly, on this point, I dissent.

¶ 45 In determining whether subsection (13) covers the covenants restricting the use of the lots to single-family type structures, we must be mindful that we are interpreting the words of a statute enacted by our General Assembly and *not* the words of a private restrictive covenant. It is true that, whether interpreting a statute or a private covenant, our

goal is to discern *the intent* of the drafter.[1] However, when the words used by the drafter are ambiguous (capable of more than one meaning), rules for interpreting a statute differ from rules for interpreting a private restrictive covenant.

¶ 46 Specifically, our Supreme Court mandates that ambiguities in the text of a private restrictive covenant *must* be resolved in favor of the unrestrained use of the real estate burdened by the covenant, based on the policy that private restrictions which burden the use of land are generally disfavored:

> We begin our analysis of this case with a fundamental premise of the law of real property. While the intentions of the parties to restrictive covenants ordinarily control the construction of covenants . . . such covenants are not favored by the law . . . and they will be construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land.

J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc., 302 N.C. 64, 70, 274 S.E.2d 174, 178 (1981) (citations omitted).

¶ 47 Our Supreme Court, however, mandates a different rule when construing the words in an ambiguous statute. We do not construe ambiguous statutory provisions *strictly*, as we would the words in a private restrictive covenant, but rather:

> [In] ascertaining the intent of the Legislature in cases of ambiguity, regard must be had to the subject matter of the statute, as well as its language, *i.e.*, the language must be read *not textually, but contextually*, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter.

*Victory Cab Co. v. Charlott*e, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951) (emphasis added); *see also Rankin*, 371 N.C. at 889, 821 S.E.2d at 792 ("The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish.").

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1. *See State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) ("The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment.").

¶ 48 The majority correctly points out that our Supreme Court has repeatedly held that private restrictive covenants limiting a lot to a single-family *structure* will not be construed to limit *the occupancy use* of that structure—that is, a private covenant restricting property to a single-family type structure will not be construed to prevent members of different families from *using* the structure at the same time. *See*, *e.g.*, *Winding Ridge v. Joffe*, 362 N.C. 225, 657 S.E.2d 356 (2008) (adopting *per curiam* the dissenting opinion in 184 N.C. App. 629, 646 S.E.2d 801 (2007)); *Hobby*, 302 N.C. at 74-75, 274 S.E.2d at 181-82. But in *Winding Ridge* and *Hobby*, our Supreme Court held in each case that the covenant language at issue was ambiguous and then resolved the ambiguity by applying the rule "that any doubt arising or ambiguity appearing [in a covenant] will be resolved against the validity of the restriction[.]" *Edney v. Powers*, 224 N.C. 441, 443, 31 S.E.2d 372, 374 (1944).

¶ 49 For instance, in *Hobby*, our Supreme Court explained:

> We disagree with the position taken by plaintiffs [who were seeking a broad interpretation of the covenants] for several reasons.
>
> First, plaintiffs' position is inconsistent with one of the fundamental premises of the law as it relates to restrictive covenants: Such provisions are not favored by the law and they will be construed to the end that all ambiguities will be resolved in favor of the free alienation of land.
>
> While it is possible that a restriction as to the type of structure would, in some instances, limit the character of the type of usage to which the building is employed, we conclude that such is not necessarily the case.

Hobby, 302 N.C. at 74, 274 S.E.2d at 181. And in *Winding Ridge*, our Supreme Court adopted the reasoning of the dissenting judge in our Court, who reasoned:

> In any event, in light of *Hobby* [and another case], the restrictive covenant in this case is at best ambiguous. It cannot be viewed as being "clearly and unambiguously drafted," as required by *Hobby*. In the absence of the requisite clarity, the ambiguity must be resolved in favor of free use of property.

Winding Ridge, 184 N.C. App. at 641, 646 S.E.2d at 809 (citation omitted).

¶ 50 However, *Hobby* and *Winding Ridge* are not directly on point, as those cases concern the interpretation of ambiguous private restrictive covenants, not of an ambiguous statute. Notwithstanding, the reasoning in those decisions does suggest that Chapter 47B-3(13) is ambiguous. Indeed, *Winding Ridge* stands for the proposition that language referring to the "use of the 'property,' [is a] concept equally consistent with both structural and occupancy restrictions." *Id.* at 641, 646 S.E.2d at 809. Therefore, the language in Chapter 47B-3(13) referring to covenants restricting property to single-family residential use is equally consistent with both structural and occupancy restrictions.

¶ 51 We must, therefore, look to the context and subject matter of the statute to determine whether our General Assembly intended "single-family residential use" to be read narrowly, to include only covenants restricting how structures are occupied, no matter their design, *or* whether our General Assembly intended that phrase to be read more broadly to also include structural covenants (i.e., covenants restricting the use of the property itself to single-family residential structures).

¶ 52 Again, our Supreme Court instructs that "regard must be had to the subject matter of the statute." *Victory Cab*, *supra*. And in my view, the subject matter of Chapter 47B-3(13) strongly suggests that our General Assembly was, at least in part, concerned with protecting covenants restricting the type of structures developed, as the statutory provision is expressly limited in application to "[c]ovenants applicable to a general or uniform scheme of *development*[.]"

¶ 53 Also, the statute speaks of covenants restricting how "the property" is used, not merely how "the structures" on those properties are used. As explained in *Winding Ridge*, a covenant restricting a "property" to "residential use" *could reasonably be* read to include, not only occupancy restrictions, but also structural restrictions.

¶ 54 Further, the second sentence in Chapter 47B-3(13), contextually, suggests that the General Assembly was concerned, at least in part, with saving structural restrictions. For instance, this sentence which preserves "single-family residential use" covenants also preserves "multi-family [] residential use" covenants. In my view, "multi-family [] residential use" covenants most logically include structural restrictions which only allow multi-family type buildings (duplexes, quadruplexes, and the like) and prohibit single-family residential type structures. Covenants requiring multi-family *structures* are much more prevalent. I am unaware of any private covenant in North Carolina (though they might exist) that restricts the *occupancy* of a structure to multi-family

use, irrespective of the type of structure placed on the property. Indeed, an owner of a duplex subject to a multi-family "occupancy" covenant would be in violation whenever there was a vacancy, as during those times, the duplex structure would only be occupied by a single family. By preserving "multi-family" use covenants, it is logical to surmise that our General Assembly had structural covenants in mind.

¶ 55 I do agree with the majority that our goal is to construe the statute *as written* and not read in language that is not there. But I am not reading in any language, as covenants restricting the use of property is "a concept equally consistent with both structural and occupancy restrictions." *Winding Ridge*, *supra*. It certainly could be argued that the better policy would be to favor protecting *all* the Country Colony covenants, to better preserve the character of this older neighborhood. But we are not the General Assembly, and Chapter 47B-3(13) could not be clearer: "Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B." Accordingly, I agree with the majority that the remaining Country Colony covenants, for instance the covenant limiting *the size* of each lot, are not protected by Chapter 47B-3(13).

¶ 56 This is not to say that our General Assembly forbids older neighborhoods from retaining their character. Indeed, that body has provided a means within the Act by which a lot owner in an older neighborhood may preserve *all* covenants. Specifically, Section 47B-4 allows *any* lot owner in an older neighborhood with covenants about to expire by operation of the Act to preserve *all* the covenants for another thirty (30) years. They do this by simply filing a notice of the covenants in the county's register of deeds, naming the other lot owners as grantees (so that the notice of the covenants will be discovered during a title search of any of the neighborhood lots going back thirty (30) years). It is simply that our General Assembly has chosen to favor the policy purposes of the Act—to simplify title searches—over the preservation of most types of restrictions which create uniformity within a neighborhood, but which do not appear recently in the chains of title.

JENNIFER DiPRIMA O/B/O GRACE DiPRIMA, PLAINTIFF
v.
BEGEE VANN O/B/O CLIFTON BENJAMIN VANN, V, DEFENDANT

No. COA20-545

Filed 18 May 2021

Stalking—civil no-contact order—unlawful conduct—specific intent—findings required

In a matter involving two teenagers who had a volatile friendship, the trial court erred by entering a civil no-contact order against defendant without making any findings of fact that defendant had the specific intent to stalk or harass plaintiff, in accordance with the definitions contained in N.C.G.S. § 50C-1(6).

Appeal by defendant from order entered 11 February 2020 by Judge Erin S. Hucks in Union County District Court. Heard in the Court of Appeals 13 April 2021.

Stepp Law Group, PLLC, by Jordan M. Griffin, and Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellee.

Middlebrooks Law, PLLC, by James G. Middlebrooks, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Clifton Benjamin Vann, V, ("defendant") appeals from entry of a No-Contact Order for Stalking entered by the district court on 11 February 2020. For the following reasons, we vacate the trial court's order.

I. Background

¶ 2 Grace DiPrima ("plaintiff") and defendant's friendship started in the third grade. By eighth grade, according to plaintiff, the two were "best of friends." At all times relevant, plaintiff and defendant both attended The Fletcher School ("Fletcher"), an educational institution for children with learning differences. Plaintiff attended Fletcher to cope with learning disabilities, and defendant enrolled to improve social skill deficits that mirror Asperger's syndrome. Plaintiff and defendant were "really, really good friends[.]"

¶ 3 Plaintiff and defendant were in contact on an almost daily basis via phone conversations, text messaging, Instagram, and an application known as "Discord." Beginning in 2018, the relationship became more volatile. Plaintiff confided with her parents that some of defendant's actions made her feel uncomfortable, such as defendant putting his arm around plaintiff and holding her hand. After disclosing these incidents to her parents, plaintiff began participating in therapy and taking medications.

¶ 4 Between July 2018 and November 2019, plaintiff and defendant exchanged multiple messages concerning the topic of suicide. Plaintiff testified that she initially interpreted defendant's suicide comments as "jokes" but later took them more seriously.[1] Plaintiff's own suicidal comments, according to her, were "few and far between."

¶ 5 During this period, defendant relayed messages mentioning "shoot[ing] up the school" and suggesting that he wanted to "kill/torture" a teacher. According to plaintiff, defendant also threatened her life and stated that he wanted to fight her parents. Moreover, plaintiff testified that defendant told her that he knew how to mix chemicals and had a vast knowledge of guns. Plaintiff's communications to defendant, in turn, were similarly morbid. For instance, plaintiff told defendant that she wanted to kill her parents and sent defendant pictures of Harry Potter characters hanging from nooses. With respect to her threats to kill her own parents, plaintiff testified that "every teenager does that. Every teenager has a moment where it's like man . . . I can't stand my parents, I want to kill them."

¶ 6 In October 2019, plaintiff briefly cut off contact with defendant. However, shortly after this two-week pause, plaintiff called defendant to tell him about puppies she was fostering. The two then went out for pizza and coffee on 21 October 2019 and to a movie two days later. These events occurred just days after the period in October 2019 in which plaintiff alleged in her complaint that defendant's conduct warranted the entry of a no-contact order.

¶ 7 In late October 2019, plaintiff and her family took a trip to Florida where plaintiff purchased a light sabre for defendant as a birthday present because, in her words, they were "best friends." Thereafter, plaintiff invited defendant to join her on a family trip to Tennessee. During this trip in November 2019, plaintiff's parents became particularly troubled by defendant's behavior. Plaintiff's father testified that defendant acted

1. Plaintiff also testified to observing defendant "cutting himself with a pen" during class one day at Fletcher.

aggressively toward plaintiff and the family and that defendant told various "exceptionally dark" stories.

¶ 8 Upon returning from Tennessee, plaintiff's parents sought to cease all contact between the two teenagers. Plaintiff's parents also brought the matter before Fletcher and requested that the school prohibit defendant from future attendance. Fletcher placed defendant on a temporary suspension until it determined that it was safe for him to return. After reviewing reports from plaintiff's clinicians and recommendations by the school's "threat assessment team," Fletcher determined that defendant was not a threat to himself or others and that it was therefore safe for him to return to campus. Thereafter, on 21 November 2019, the Head of School at Fletcher sent an e-mail to defendant's parents stating that the school had "completed [its] due diligence review of [defendant's] status and [that] he is administratively cleared to return to school, effective 11-20-2019." Unsatisfied with this outcome, plaintiff sought court intervention to prevent defendant's return to Fletcher.[2]

¶ 9 On 19 November 2019, Jennifer DiPrima filed a "Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct" on behalf of plaintiff, who was sixteen years old at the time, against Begee Vann on behalf of defendant, who was seventeen years old at the time. Defendant did not file an answer to the complaint, nor did he file any motions with respect to the complaint.

¶ 10 On the same day, 19 November 2019, the district court entered an *ex parte* Temporary No-Contact Order against defendant. The Temporary No-Contact Order was extended three times until the matter appeared for an evidentiary hearing on 31 January 2020. At the time of the hearing, plaintiff was sixteen and defendant seventeen years of age.

¶ 11 At the close of plaintiff's case, defense counsel moved to dismiss on the grounds that the evidence presented did not support plaintiff's allegations of "stalking." Plaintiff's trial counsel—who did not represent plaintiff during her arguments on appeal—argued the following: "[Chapter] 50C is not based on what the defendant thinks, what he intended, and what he meant by any of this. This is all based on [plaintiff's] subjective intent. It's a subjective test based on what the plaintiff felt, how she was made to feel." Trial counsel for plaintiff went on to state

2. The Head of School advised that defendant's return may violate the temporary No-Contact Order and therefore defendant may wish to consult legal counsel to determine how to best navigate this matter and protect defendant legally. Defendant did not return to Fletcher after this point.

that "[b]ased on [plaintiff's] subjective tests and the subjectivity of everything that's taken place, she's in fear." The district court orally denied the motion. Following the hearing, the district court judge stated that she would take the matter under advisement.

¶ 12 On 11 February 2020, the district court entered a one-year No-Contact Order for Stalking or Nonconsensual Sexual Conduct (the "Order"). The district court concluded that plaintiff had suffered unlawful conduct by defendant in the following ways:

> The Defendant has been intimidating and harassing the Plaintiff by the following actions: November 8-11, 2019, Defendant repeatedly followed and touched the Plaintiff without her consent and after telling the Defendant to stop; on July 30, 2018, September 20-21, 2018, October 26-27, 2018, June 23, 2019, and October 1, 2019 the Defendant has threatened suicide; on Oct[ober] 1, 2019, Defendant threatened to kill and physically harm the Plaintiff if she "crosses" him or if she stops being his friend; Defendant has threatened to shoot up the school; Defendant told the Plaintiff he wanted to kill and torture two separate teachers at the parties' school: Defendant tried to cut himself with a pen in class when he was upset with Plaintiff: November 8-11, 2019, Defendant told the Plaintiff that he wanted to fight both of her parents; Defendant admitted to the Plaintiff that he has suicidal ideations; Defendant has researched how to make bombs and shoot up the school. On more than one occasion, the Defendant has followed and otherwise harassed the Plaintiff and has placed the Plaintiff in reasonable fear for her safety and the safety of the Plaintiff's parents and the Defendant has caused the Plaintiff to suffer substantial emotional distress by placing the Plaintiff in fear of death, bodily injury, or continued harassment and has, in fact, caused the Plaintiff substantial emotional distress.

As a result, the court ordered that defendant shall cease "stalking" and "harass[ing]" plaintiff and neither "visit, assault, molest, or otherwise interfere" with plaintiff, nor "contact the plaintiff by telephone, written communication, or electronic means." Furthermore, the Order prohibited defendant from entering or remaining present at Fletcher (or plaintiff's residence) at times when plaintiff was present.

¶ 13 Defendant filed his notice of appeal of the Order on 11 March 2020. This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

II. Discussion

¶ 14 "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Tyll v. Willets*, 229 N.C. App. 155, 158, 748 S.E.2d 329, 331 (2013) (quoting *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011)).

A. Defendant's Intent

¶ 15 Defendant argues that the trial court erred by failing to make findings of fact showing that he had the specific intent to stalk or otherwise commit "unlawful conduct" against plaintiff. We agree.

¶ 16 "Upon a finding that the victim has suffered unlawful conduct committed by the respondent, the court may issue temporary or permanent civil no-contact orders . . . ." N.C. Gen. Stat. § 50C-5(a) (2019). Two types of "unlawful conduct" can support the entry of a civil no-contact order: nonconsensual sexual conduct or "stalking." N.C. Gen. Stat. § 50C-1(7) (2019). As plaintiff does not allege nonconsensual sexual conduct, we must decide whether the evidence supports a finding that defendant stalked plaintiff.

¶ 17 "Stalking" is statutorily defined as follows:

> On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose **with the intent** to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

N.C. Gen. Stat. § 50C-1(6)(a)-(b) (2019) (emphasis added). As for behavior that amounts to "harassing," section 50C-1(6) refers to the definition set out in N.C. Gen. Stat. § 14-277.3A(b)(2): "Knowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2019). However, a "finding of harassment alone, even if supported by competent evidence, cannot be the sole basis to sustain entry of a civil no-contact order under N.C. Gen. Stat. § 50C-1(6)." *Ramsey v. Harman*, 191 N.C. App. 146, 149, 661 S.E.2d 924, 926 (2008). The *Ramsey* Court specifically held that N.C. Gen. Stat. § 50C-1(6) "requires the trial court to further find defendant's harassment was accompanied by the specific intent to either: (1) place the person in fear for their safety, or the safety of their family or close personal associates or (2) cause the person substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and in fact cause that person substantial emotional distress." *Id.* (citing N.C. Gen. Stat. § 50C-1(6)). We reiterated that holding in *St. John v. Brantley*, stating that the "entry of a civil no-contact order requires not only findings of fact that show the defendant harassed the plaintiff, but also that the 'defendant's harassment was accompanied by the specific intent' described in section 50C-1(6)(a) or (b)." *St. John v. Brantley*, 217 N.C. App. 558, 562, 720 S.E.2d 754, 757 (2011) (citing *Ramsey*, 191 N.C. App. at 149, 661 S.E.2d at 926).

¶ 18 In the present case, the trial court failed to make any finding that defendant specifically intended to cause any of the harm set forth in N.C. Gen. Stat. § 50C-1(6). Plaintiff's appellant counsel argues that such a finding can be inferred from the trial court's other findings. We reject this argument. It is clear from our holdings in *Ramsey* and *St. John* that such a finding must be specifically made, not inferred. Even if we were to accept plaintiff's argument that an intent finding can be inferred when applied to cases involving two adults, as opposed to two minor teenagers with learning and processing issues, it would still fail given the unique facts of this case. In this action, the evidence shows that two minor teenagers with learning and processing issues mutually exchanged disturbing communications during a volatile yet consensual relationship. Plaintiff herself admitted that this behavior was a "teenage thing," and testimony elicited from defendant's psychologist and psychiatrist confirmed the same. While we do not condone the dynamics of the parties' relationship, we realize that "normal" teenagers may express their emotions through unsettling discourse. As succinctly stated by defendant's psychologist, Ryan Kelly, M.D., "normal is not [always] healthy." This situation is a perfect example as to why a specific finding of intent

is necessary under the statute. Thus, the trial court erred by failing to make findings of fact as to defendant's intent.[3]

¶ 19 We recognize that the current printed forms from the North Carolina Administrative Office of the Courts (the "AOC") do not inform our district court judges of the need to make that determination. Therefore, we encourage the AOC to revise AOC-CV-520 (and any other relevant papers) to include the statutory requirements set out in Chapter 50C including, but not limited to, a defendant's specific intent to commit unlawful conduct against the movant.

III. Conclusion

¶ 20 For the foregoing reasons, we vacate the trial court's order.

VACATED.

Chief Judge STROUD and Judge JACKSON concur.

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY EXECUTIVE OFFICE PARK OF DURHAM ASSOCIATION, INC., PETITIONER

v.

MARTIN E. ROCK A/K/A MARTIN A. ROCK, RESPONDENT

LIEN DATED: OCTOBER 23, 2018 LIEN RECORDED: 18 M 1195 IN THE CLERK'S OFFICE, DURHAM COUNTY COURTHOUSE

No. COA20-405

Filed 18 May 2021

Associations—non-judicial power of sale—North Carolina Unit Ownership Act—North Carolina Condominium Act

Petitioner association lacked authority to effect a non-judicial foreclosure of respondent's office condominium units for non-payment of assessments where petitioner's declaration was signed in 1982 and governed under the North Carolina Unit Ownership Act, which did not provide for a non-judicial power of sale. Petitioner never amended its declaration to invoke the North Carolina Condominium Act (applicable to all condominiums created after October 1, 1986) to permit non-judicial power of sale.

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3. In light of our holding above, we do not address defendant's remaining arguments.

Appeal by respondent from order entered 4 March 2019 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 27 April 2021.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Matthew Waters and Hope Derby Carmichael, for petitioner-appellee.

Mark Hayes for respondent-appellant.

TYSON, Judge.

¶ 1 Martin Rock ("Respondent") appeals from an order authorizing a sale of three office condominium units. We vacate and remand.

I. Background

¶ 2 Executive Park Developers, LLC developed Executive Office Park. Executive Park Developers, LLC filed a "Declaration of Unit Ownership" creating a governing entity for the development, Executive Office Park of Durham Association, Inc. ("Petitioner") on or about 9 November 1982, pursuant to N.C. Gen. Stat. § 47A (2019). Petitioner "consist[s] of all the unit owners [in the development] acting as a group in accordance with the Bylaws and this Declaration."

¶ 3 The terms of the Declaration provided Petitioner would be governed by "the provisions of the North Carolina Unit Ownership Act." *See* N.C. Gen. Stat. § 47A. Petitioner's board of directors was granted "all of the powers and duties set forth in the [North Carolina] Unit Ownership Act, except as limited by this declaration (sic) and the Bylaws." The Declaration required unit owners be subject to assessments ordered by the Board of Directors.

¶ 4 If the assessment was not paid after "more than thirty (30) days," "[a]ny sum assessed remaining unpaid . . . shall constitute a lien upon the delinquent unit or units when filed of record with in (sic) the Office of the Clerk of Superior Court of Durham County in the manner provided for by Article 8 of Chapter 44 of the General Statutes of North Carolina as amended."

¶ 5 The Declaration provided "the Bylaws" "shall be in the form attached here to as Exhibit 'E.' " Attached to the Declaration labeled "Exhibit E" were model bylaws which could be adopted by the Petitioner. No document titled as "Exhibit E" was executed.

¶ 6 Respondent owns three units within Executive Office Park. Petitioner alleged Respondent was in default under the Declaration

because of non-payment of assessments. Respondent countered the amounts Petitioner asserted were inflated by unreasonable fines, interest, and fees.

¶ 7 Respondent also sought to offset amounts allegedly owed against costs he incurred for Petitioner's alleged failure to repair flood damages to his units. This flood damage caused a mold problem in the units rendering them unusable.

¶ 8 Petitioner alleged Respondent was in arrears for fees and assessments since September 2013 totaling a balance due of $69,751.89 as of 14 December 2017. Respondent made a redemption payment of $80,950.00, which Petitioner received and accepted two weeks later on 28 December 2017. On 19 January 2018, petitioner assessed Respondent $35,890.00 in legal fees. Petitioner's ledger shows $24,706.89 in write-off credits and Respondent owes a balance of $780.00.

¶ 9 On 22 October 2018, Petitioner filed a claim of lien, alleging Respondent owed $8,475.00 plus attorney's fees and costs of $590.50. Petitioner sought a non-judicial foreclosure sale of Respondent's three units. After a hearing, an order was filed by the clerk of court authorizing sale of the three properties on 13 December 2018. An "Order Affirming Order Authorizing Sale" was filed in Superior Court on 4 March 2019. Respondent appeals.

II. Jurisdiction

¶ 10 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

¶ 11 Respondent argues the foreclosure order is void. He argues, in the alternative, if the order is not void, he was not in default following Petitioner's acceptance of his redemption payment of more than the balance stated.

IV. Standard of Review

¶ 12 This Court reviews the trial court's order authorizing an association's non-judicial power of sale foreclosure *de novo*. *See In re Foreclosure of Clayton*, 254 N.C. App. 661, 667, 802 S.E.2d 920, 925 (2017).

V. Order of Foreclosure

¶ 13 Respondent argues N.C. Gen. Stat. § 47C (2019) applies to "all condominiums created within this State after October 1, 1986", contains the provisions authorizing Petitioner to pursue a non-judicial foreclo-

sure sale, and is inapplicable to Executive Office Park and Respondent. In reviewing Respondent's argument, we are guided by several well-established principles and precedents of statutory construction.

A. Statutory Construction

¶ 14 Our Supreme Court stated: "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the [text and plain] language of the statute[.]" *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

¶ 15 The Supreme Court continued: "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive 'or', the application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either one of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

¶ 16 "[S]tatutes *in pari materia* must be read in context with each other." *Cedar Creek Enters., Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976) (citation omitted). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (alteration, citations and internal quotation marks omitted).

¶ 17 Our Supreme Court held, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control[.]" *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

B. Power of Sale Foreclosure

¶ 18 Over forty years ago, this Court stated: "Historically, foreclosure under a power of sale has been a private contractual remedy." *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980).

¶ 19 The Petitioner's Declaration was signed in 1982 and expressly provides Petitioner would be governed by "the provisions of the North Carolina Unit Ownership Act" enacted in 1963. The North Carolina

Condominium Act was not enacted until 1985 and is applicable to "all condominiums created within this State *after October 1, 1986*." N.C. Gen. Stat. § 47C-1-102(a) (2019) (emphasis supplied).

¶ 20 The Unit Ownership Act does not include provisions or the power for a non-judicial power of sale. N.C. Gen. Stat. § 47C-1-102(a) provides the Condominium Act "do[es] not invalidate existing provisions of the declarations, bylaws, or plats or plans of th[e "Unit Ownership Act"]."

C. Amendment of Declaration

¶ 21 An association can amend their declaration to bring it within the provisions of the North Carolina Condominium Act. *See* N.C. Gen. Stat. § 47C-1-102(b) (2019). Petitioner did not execute such a clause or addendum. The record does not reflect Petitioner's declaration has been amended since it was executed. Petitioner's declaration does not include the power of non-judicial foreclosure. N.C. Gen. Stat. § 47C-1-102(a).

¶ 22 The superior court's "Order Affirming Order Authorizing Sale" is vacated and remanded for dismissal. In light of our decision, it is unnecessary to address Respondent's remaining arguments as they are unlikely to reoccur upon remand.

VI. Conclusion

¶ 23 Petitioner did not acquire the statutory authority based on its unamended declaration to effect a non-judicial foreclosure of Respondent's units. Petitioner's board did not authorize an addendum invoking the North Carolina Condominium Act to permit such a procedure. *See* N.C. Gen. Stat. § 47C-1-102(b). The "Order Affirming Order Authorizing Sale" is vacated and remanded for dismissal. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge STROUD and Judge ZACHARY concur.

MILLER v. CAROLINA COAST EMERGENCY PHYSICIANS, LLC

[277 N.C. App. 449, 2021-NCCOA-212]

CHARLOTTE POPE MILLER, Administratrix of the Estate of the Late JOHN LARRY MILLER, Plaintiff

v.

CAROLINA COAST EMERGENCY PHYSICIANS, LLC, HARNETT HEALTH SYSTEM, INC. d/b/a BETSY JOHNSON REGIONAL HOSPITAL, and DR. AHMAD S. RANA, Defendants

No. COA20-399

Filed 18 May 2021

1. Appeal and Error—cross-appeals—Appellate Rule 3—not time-barred

In a medical malpractice case—in which plaintiff filed notice of appeal from multiple orders, including one that granted defendants (including a doctor and a hospital) summary judgment—defendants were not required to file their cross-appeals (challenging the trial court's denial of their respective motions to dismiss) within the general thirty-day window for taking notice of appeal, because they could not have appealed from the challenged orders, which were interlocutory, until the whole case was disposed of. Since defendants' cross-appeals were filed within ten days of plaintiff's notice of appeal and were related to plaintiff's appeal, they were not time-barred pursuant to Appellate Rule 3.

2. Jurisdiction—personal—general appearance—motion to tax costs

In a medical malpractice case, the trial court properly denied defendant-doctor's motion to dismiss, in which he asserted lack of personal jurisdiction, insufficient process, insufficient service of process, and the statute of limitations, because the doctor's previous motion to tax costs (based on plaintiff's failure to pay costs after taking a voluntary dismissal) constituted a general appearance in the case, and the defenses asserted in his subsequent amended answer were thus waived.

3. Medical Malpractice—9(j) certification—expert—reasonable expectation of qualification and testimony—at time of complaint

In a medical malpractice case, plaintiff exercised reasonable diligence in ensuring her Civil Procedure Rule 9(j) certification met the pleading requirements, where, at the time she filed her complaint, she had obtained the opinion of a practicing emergency physician whom plaintiff could have reasonably expected to qualify as

an expert regarding the standard of care of both defendant-hospital and defendant-doctor, and the expert stated his opinion that the hospital breached the standard of care. The expert's later statements that he did not have an opinion as to whether a violation occurred and that he was not an expert in emergency nursing care did not negate the plaintiff's reasonable belief at the time her complaint was filed that he would provide testimony against the hospital.

4. Medical Malpractice—9(j) certification—review of medical records—handwritten notes by plaintiff not medical records

In a medical malpractice case, plaintiff's Rule 9(j) expert was not required to review plaintiff's handwritten notes made after her husband's death (regarding the treatment her husband received at a hospital emergency room), because those notes did not qualify as "medical records" where they were not created by a physician or other health care provider, nor did the notes come from information provided by such a person. In so holding, the Court of Appeals applied the North Carolina Medico-Legal Guidelines, which were also consistent with the legislative intent behind updates to Rule 9(j) regarding this issue.

5. Medical Malpractice—9(j) certification—review of all medical records—factual dispute—taken in light most favorable to plaintiff

In a medical malpractice case, where there were factual disputes over whether plaintiff's Civil Procedure Rule 9(j) medical expert reviewed all of the necessary medical records, including relevant EMT records, and whether prior medical records should have been reviewed as being pertinent to the care at issue, at the preliminary stage all inferences were to be drawn in plaintiff's favor. Therefore, the trial court erred in granting defendant-doctor's motion to dismiss on this basis.

6. Medical Malpractice—9(j) certification—familiarity with standard of care—review of relevant demographic information—dismissal of expert premature

In a medical malpractice case, the trial court erred in granting defendant-doctor's Rule 9(j) motion to dismiss, which argued that plaintiff's Civil Procedure Rule 9(j) expert failed to review relevant demographic information during the time period the alleged malpractice occurred. The record reflects the expert did review some relevant data from the appropriate time period, and plaintiff was entitled to expect that her expert would supplement any lack of

knowledge about the community's standard of care in order to qualify as an expert at trial.

7. Evidence—motion to exclude expert—medical malpractice case—knowledge of standard of care

In a medical malpractice case in which plaintiff asserted that negligent care provided by a hospital and a doctor resulted in her husband's death, the trial court abused its discretion by excluding the testimony of plaintiff's Civil Procedure Rule 9(j) expert with regard to claims against the doctor where the record reflected the expert reviewed relevant data about the community at the time the alleged malpractice occurred and thus had familiarity with the pertinent standard of care. However, plaintiff's 9(j) expert was properly disqualified with regard to the claims against the hospital based on the expert's testimony that he was not an emergency nursing expert and had no criticisms or opinions regarding the hospital or its staff.

8. Evidence—expert testimony—admissibility—Rule 702—opinion based on sufficient facts or data

In a medical malpractice case, the trial court erred by disqualifying plaintiff's expert, a practicing emergency room physician, on multiple bases. First, the trial court's exclusion on the basis the expert was not familiar with the standard of care as required by N.C.G.S. § 90-21.12(a) at the time the alleged malpractice occurred was not supported by the record, since the expert did review relevant data about the community and hospital during the pertinent time. Second, the trial court misapplied Evidence Rule 702(a) by concluding that the expert's opinions were not founded on sufficient data (because he had not reviewed certain records). However, questions regarding the basis for the expert's opinions went to the weight and credibility of his testimony and not to admissibility, and the expert was qualified pursuant to Rule 702(b).

9. Medical Malpractice—summary judgment—plaintiff's experts improperly excluded—additional proceedings required

In a medical malpractice case, where the trial court improperly excluded the testimony of plaintiff's experts against defendants (a doctor and a hospital)—requiring the reversal of the court's orders of exclusion—the trial court's orders granting summary judgment to defendants were vacated because they were based on a lack of any genuine issue of material fact regarding the applicable standard of care, breach of that standard, and causation, issues on which the experts would have provided evidence. The matter was remanded for further proceedings.

Appeal by Plaintiff from Orders entered 23 April 2019 and 4 October 2019 by Judge Claire V. Hill, and Cross-Appeals by Defendants from Orders entered 9 November 2015 by Judge Stanley L. Allen and 17 January 2017 by Judge Gale M. Adams, in Harnett County Superior Court. Heard in the Court of Appeals 27 January 2021.

Brent Adams & Associates, by Brenton D. Adams, and Hedrick, Gardner, Kincheloe, and Garofalo, LLP, by Patricia P. Shields, for plaintiff-appellant.

Walker, Allen, Grice, Ammons, Foy & Klick, LLC, by Louis F. Foy III and Alicia R. Johnson, for defendants-appellees Dr. Ahmad Rana and Carolina Coast Emergency Physicians.

Yates, McLamb, & Weyher, L.L.P., by Maria P. Wood and Kristina M. Wilson, for defendant-appellee Harnett Health System, Inc.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Charlotte Pope Miller[1] (Plaintiff) appeals from Orders granting Defendants Dr. Ahmad Rana and Carolina Coast Emergency Physicians, LLC (collectively Dr. Rana) and Harnett Health System, Inc. d/b/a Betsy Johnson Regional Hospital (Harnett Health) (collectively Defendants) Summary Judgment after granting Defendants' Motions to Dismiss and to Exclude Plaintiff's expert witnesses in Plaintiff's medical malpractice suit. Defendants cross-appeal the trial court's Orders denying their earlier Motions to Discontinue and to Dismiss Plaintiff's suit. The Record before us reflects the following:

¶ 2 Plaintiff is the Administrator of the estate of her late husband, John Larry Miller (Decedent). On 30 September 2011, Plaintiff filed a medical malpractice Complaint in Harnett County Superior Court against Defendants claiming Decedent died in Defendants' care and as a result of their negligence (the 2011 Complaint). The 2011 Complaint alleged Decedent died after two trips to Harnett Health's emergency room on 8 and 9 March 2010. On 8 February 2013, Plaintiff voluntarily dismissed the 2011 Complaint without prejudice.

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1. We use Plaintiff's name as captioned although we acknowledge Plaintiff testified she has since remarried and changed her name to Charlotte Pope Miller Ennis.

¶ 3 On 6 February 2014, Plaintiff filed another Complaint (the 2014 Complaint) in Harnett County Superior Court alleging Decedent died while in Defendants' care and as a result of Defendants' negligence. In the 2014 Complaint, Plaintiff alleged Decedent—at the time, a sixty-three-year-old man—complained of not being able to urinate on 5 March 2010. After three days of not being able to urinate, Decedent was transported by ambulance to Harnett Health's emergency room on 8 March 2010. Upon arriving at Harnett Health's emergency room, Dr. Ahmad Rana—then employed by Carolina Coast Emergency Physicians, LLC—assumed Decedent's care. Decedent complained of pain, and Dr. Rana's notes indicated Decedent's abdomen was distended and hard. Dr. Rana was aware of Decedent's pre-existing conditions including prior renal failure, diabetes, and urinary tract infections.

¶ 4 On 8 March 2010, Dr. Rana ordered the placement of a catheter and a urinalysis and urine culture. Because the urinalysis showed potential infection, Dr. Rana prescribed Decedent antibiotics and discharged Decedent with the catheter in place.

¶ 5 On 9 March 2010, Decedent returned to Harnett Health's emergency room complaining of continued pain and inability to urinate. Dr. Rana again assumed Decedent's care. Dr. Rana ordered blood work for Decedent, and those results showed high serum potassium and creatinine levels consistent with renal failure, especially given Decedent's history of renal failure. Because of these lab results, Dr. Rana ordered Decedent be given 30 grams Kayexalate. Nursing notes indicate Plaintiff gave Decedent the thirty grams of Kayexalate at 23:25 on 9 March 2010. These notes also indicate "gurgling after administration" and that Decedent's mouth was suctioned. The notes state Decedent's oxygen saturation level fell, and a respiratory therapist was called to suction Decedent's mouth. At 23:30, Decedent vomited a "bright orange" substance and became unresponsive; nurses alerted Dr. Rana. The respiratory therapist suctioned 100 ml of "bright orange secretions" from Decedent. Decedent was moved to another room where Dr. Rana and others attempted to resuscitate Decedent. When asked by the respiratory therapist whether Plaintiff wanted medical personnel to continue resuscitative efforts, Plaintiff declined. Decedent passed away at, or shortly after, midnight.

¶ 6 Plaintiff made notes of the events beginning on 8 March 2010 leading up to Decedent's death. Plaintiff's handwritten notes included an account describing a nurse trying to give Decedent "a swallow" of the Kayexalate. Plaintiff asked Decedent to "take a sip" and Decedent did. Decedent then started coughing and the nurse tried to suction Decedent

to no avail. Plaintiff tried to assist the nurse in suctioning. The notes go on to describe the rest of the events leading to Decedent's death. Plaintiff did not find her handwritten notes until 2018 and the notes were not provided to her expert witnesses.

¶ 7 The 2014 Complaint included a "Rule 9(j)" certification, pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j), stating Decedent's medical care and medical records had been "reviewed by a person who is reasonably expected to qualify as an expert witness . . . and who is willing to testify that" Defendants' care breached the applicable standard of care and caused Decedent's death. In subsequent responses to discovery requests by Defendants, Plaintiff identified Dr. Robert E. Leyrer as the expert referenced in the 2014 Complaint. Dr. Leyrer was employed as an emergency physician in Florida at that time. Prior to filing the 2011 Complaint, Plaintiff had retained Dr. Leyrer to review Decedent's records and provide a preliminary opinion regarding Plaintiff's case. In response to discovery requests, Plaintiff also produced an affidavit provided by Dr. Leyrer stating he had reviewed medical records, including records from Decedent's 8 and 9 March visits to Harnett Health's emergency room and that "the defendants" violated the standard of care as alleged in Plaintiff's 2011 Complaint; Dr. Leyrer incorporated the 2011 Complaint by reference. Dr. Leyrer also stated he was willing to testify "about the violation of the standard by the defendants[.]"

¶ 8 In 2015, after Plaintiff filed the 2014 Complaint, Dr. Leyrer provided deposition testimony regarding his opinions as to Defendants' alleged negligence. Specifically, as to Harnett Health, Dr. Leyrer testified he was not offering criticisms specific to Harnett Health and did not consider himself an expert in emergency nursing. Dr. Leyrer stated he did not have any opinions as to whether Harnett Health breached the standard of care. The Record does not indicate Dr. Leyrer made these facts known to Plaintiff prior to Plaintiff filing her 2014 Complaint.

¶ 9 On 13 March 2014, Dr. Rana filed an Answer to Plaintiff's 2014 Complaint. This Answer did not assert any defenses of insufficient process, insufficient service of process, or lack of personal jurisdiction. The Answer did assert Plaintiff had not paid Defendants' costs after voluntarily dismissing the 2011 Complaint, pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure (Rule 41(d)). Dr. Rana subsequently filed a Motion to Tax Costs, pursuant to Rule 41(d) on 20 March 2014. Shortly after Dr. Rana filed the Motion to Tax Costs, the parties conferred and agreed on an amount which Plaintiff paid—the trial court never heard Dr. Rana's Motion to Tax Costs.

¶ 10 On 4 April 2014, Dr. Rana filed an Amended Answer as of right that included Motions to Dismiss raising the defenses of insufficient process, insufficient service of process, lack of personal jurisdiction, and the statute of limitations. The trial court heard arguments on Dr. Rana's Motions to Dismiss on 12 December 2016. On 17 January 2017, the trial court entered an Order denying Dr. Rana's Motions concluding the previously filed Motion to Tax Costs was a general appearance in the suit conferring personal jurisdiction to the trial court over Dr. Rana and that Dr. Rana's process, service of process, and personal jurisdiction defenses in his Amended Answer did not relate back to his original Answer, and were, thus, waived.

¶ 11 Dr. Rana filed written Notice of Appeal from the trial court's Order denying his Motions to Dismiss to this Court on 10 February 2017. We granted Plaintiff's Motion to Dismiss the Appeal on 28 September 2017.

¶ 12 On 18 July 2014, Harnett Health filed its Answer. On 6 October 2015, Harnett Health filed a Motion to Dismiss pursuant to Rule 9(j) because Dr. Leyrer testified in his deposition that he had no opinion as to whether Harnett Health breached the standard of care and that he did not consider himself an emergency nursing expert. On 9 November 2015, the trial court entered an Order denying Harnett Health's Rule 9(j) Motion to Dismiss concluding Plaintiff's Complaint facially complied with Rule 9(j), and Plaintiff "exercised reasonable care and diligence" in assuring her Rule 9(j) certification was true and that Plaintiff reasonably expected Dr. Leyrer to qualify and testify as an expert witness against Harnett Health.

¶ 13 On 2 March 2015, Plaintiff filed her Designation of Expert Witnesses. Plaintiff designated Dr. Leyrer, pursuant to her Rule 9(j) certification, as well as Dr. Gary B. Harris. Plaintiff anticipated Dr. Harris, as a practicing emergency room physician and after reviewing the various medical records, would testify Defendants had breached the applicable standard of care and Defendants' breaches caused Decedent's death.

¶ 14 On 1 March 2019, Dr. Rana filed Motions to Exclude both Dr. Leyrer and Dr. Harris as expert witnesses, a Rule 9(j) Motion to Dismiss, and a Motion for Summary Judgment. The same day, Harnett Health filed a Motion to Disqualify and Exclude Plaintiff's Expert Witnesses and Motion for Summary Judgment. The trial court heard arguments on Defendants' Motions on 1 April 2019.

¶ 15 The trial court granted Dr. Rana's Rule 9(j) Motion to Dismiss on 4 October 2019 finding:

> 1. The plaintiff's handwritten records existed and were available to Dr. Robert Leyrer before the filing of the Complaint, as they were the plaintiff's own;
>
> 2. The Decedent's EMT records and certain prior medical records existed that were available had plaintiff exercised a reasonable inquiry before the filing of the Complaint;
>
> 3. The plaintiff's Rule 9(j) expert witness, Dr. Robert Leyrer, was not provided all of these records prior to the filing of the Complaint;
>
> 4. Dr. Robert Leyrer did not review all of the medical care and medical records pertaining to the alleged negligence that were available to the plaintiff after reasonable inquiry as required;
>
> 5. The contents of the handwritten notes substantially enhance and alter the timeline of events that occurred on March 9, 2010, and reflect additional medical care that could not have otherwise been known to Dr. Leyrer at the time the Complaint was filed;
>
> 6. Dr. Robert Leyrer did not review or come to know relevant demographic information in Dunn, North Carolina or the County of Harnett for the relevant time frame including 2010 in order to provide a standard of care opinion in this matter[.]

Consequently, the trial court concluded:

> 1. Dr. Robert Leyrer's testimony was not based on sufficient facts and data as required by Rule 702 of the N.C. Rules of Evidence because his opinions did not consider 1) the facts set forth in plaintiff's handwritten notes outlining additional medical care Decedent received and additional medical decisions made on March 9, 2010, 2) the EMT records, and 3) certain prior medical records relevant to Decedent's health history prior to the incident;
>
> 2. It was not reasonable to expect Dr. Robert Leyrer would qualify as an expert witness to provide testimony on the applicable standard of care because he was unfamiliar with the local standards at the time of the incident as required;

> 3. Although the plaintiff's claim for relief facially complied with Rule 9(j) of the North Carolina Rules of Civil Procedure, discovery in the case demonstrated that the plaintiff failed to comply with the requirements of Rule 9(j)[.]

¶ 16 The trial court granted Defendants' Motions to Exclude Dr. Leyrer in Orders entered 23 April 2019. As to Harnett Health's Motion, the trial court found Dr. Leyrer had not "been to Dunn, [North Carolina] or Harnett County[;]" Dr. Leyrer had reviewed "website information" regarding Harnett Health's hospital "from 2015[;]" and that the demographic data regarding the Dunn community Dr. Leyrer reviewed were from 2013 to 2015 and not 2010, "pursuant to N.C. Gen. Stat. 90-21.12." The trial court also found Dr. Leyrer testified that he had no standard of care "criticisms or opinions relating to the care provided by any of the nurses or personnel at Harnett Health" and he was not an emergency nursing expert. Therefore, the trial court granted Harnett Health's Motion to Exclude Dr. Leyrer. The trial court also granted Dr. Rana's Motion to Exclude Dr. Leyrer because the demographic information Dr. Leyrer reviewed was not from 2010, "pursuant to N.C. Gen. Stat. 90-21.12."

¶ 17 On 4 October 2019, the trial court granted Defendants' Motions to Exclude Dr. Harris. The trial court, citing North Carolina Rule of Evidence 702, N.C. Gen. Stat. § 90-21.12, and *Billings v. Rosenstein*, 174 N.C. App. 191, 619 S.E.2d 922 (2005), found: "Dr. Harris did not review the plaintiff's handwritten notes, certain EMT records, or certain prior medical records before forming his opinions in this case. Further, he has not rendered any causation opinions considering the events and actions as set forth in those documents." Therefore, the trial court concluded Dr. Harris did not qualify "under Rule 702(a) to render an opinion in this case." Moreover, the trial court found "because Dr. Harris has not sufficiently demonstrated through his depositions or affidavits that he is familiar with the local standards at the time of this incident, as required by N.C. Gen. Stat. § 90-21.12, he is not qualified to render standard of care opinions in this case." As such, the trial court excluded Dr. Harris as an expert witness.[2]

¶ 18 Consequently, regarding Defendants' Motions for Summary Judgment, the trial court found "no genuine issues of material fact exist as to the applicable standard of care, liability, proximate causation, plaintiff's contributory negligence, damages and agency." Therefore, the

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2. The trial court used identical language in excluding Dr. Harris in both Orders granting Defendants' Motions to Exclude.

trial court concluded Defendants were entitled to judgment as a matter of law.

¶ 19 On 4 November 2019, Plaintiff filed written Notice of Appeal to this Court from the trial court's 23 April 2019 Orders granting Defendants' Motions to Exclude Dr. Leyrer and the trial court's 4 October 2019 Order granting Defendants' Motions to Exclude Dr. Harris, to Dismiss pursuant to Rule 9(j), and for Summary Judgment.[3]

¶ 20 On 14 November 2019, Dr. Rana filed a written Notice of Cross-Appeal to this Court from the trial court's 17 January 2017 Order "denying Defendants' Motion to Discontinue Action pursuant to Rule 4(e) and Motion to Dismiss pursuant to Rule 12(b)(2), (4), and (5) of the North Carolina Rules of Civil Procedure, and the statute of limitations defense" pursuant to N.C. Gen. Stat. § 1-277.

¶ 21 That same day, Harnett Health filed a written Notice of Cross-Appeal to this Court from the trial court's 9 November 2015 Order denying Harnett Health's Rule 9(j) Motion to Dismiss, pursuant to N.C. Gen. Stat. § 1-277.

Issues

¶ 22 To resolve this Appeal and Cross-Appeals, we address, in turn, the following issues in order: (I) whether Defendants' Cross-Appeals were timely taken and are properly before this Court; if so, (II) whether the trial court erred in denying Dr. Rana's Motion to Dismiss on the basis of waiver by making a general appearance through his Motion to Tax Costs; and (III) whether the trial court erred by denying Harnett Health's Rule 9(j) Motion to Dismiss in light of Dr. Leyrer's subsequent deposition testimony; then, with respect to Plaintiff's Appeal, (IV) whether the trial court erred in granting Dr. Rana's Rule 9(j) Motion to Dismiss on the basis Plaintiff could not expect Dr. Leyrer to qualify as an expert because he failed to review all the medical records pertaining to Decedent's care and was not adequately familiar with the Dunn community to offer expert opinion testimony; (V) whether the trial court erred in granting Defendants' Motions to exclude both of Plaintiff's expert witnesses; and, finally, (VI) whether Defendants' Motions for Summary Judgment were properly granted on the basis Plaintiff's experts had been excluded.

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3. Plaintiff's written Notice of Appeal lists several other Orders. Plaintiff only briefed the Orders and Judgments above.

Analysis

I. Motions to Dismiss the Cross-Appeals

¶ 23 **[1]** Harnett Health filed a Cross-Appeal arguing the trial court erred in denying Harnett Health's Motion to Dismiss for lack of a proper Rule 9(j) expert. Dr. Rana filed a Cross-Appeal arguing the trial court erred when it denied his Motion to Dismiss the case for lack of personal jurisdiction, insufficient process, insufficient service of process, and the statute of limitations. Plaintiff has filed Motions to Dismiss these Cross-Appeals with this Court.

¶ 24 Plaintiff contends both Defendants' Cross-Appeals are time-barred by Rule 3 of the North Carolina Rules of Appellate Procedure (Rule 3) and our holding in *Slaughter v. Slaughter*, 254 N.C. App. 430, 803 S.E.2d 419 (2017). First, Rule 3(c)(1) provides a party must file a notice of appeal "within thirty days after entry of judgment . . . ." N.C. R. App. P. 3(c)(1) (2021). Rule 3(c)(3) provides that a party may provide notice of a cross-appeal within ten days of an opposing party's notice of appeal. N.C. R. App. P. 3(c)(3) (2021). "Failure to give timely notice of appeal in compliance with . . . Rule 3 . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citation and quotation marks omitted).

¶ 25 Moreover, this Court in *Slaughter* held—in cases where "multiple, separate orders issue, and one party appeals from some, but not all of the orders"—a cross-appellant who files a cross-appeal within the ten-day window, but outside the thirty-day window for appeals generally, may only cross-appeal the orders which the original party appealed. *Slaughter*, 254 N.C. App. at 444, 803 S.E.2d at 428-29. Plaintiff filed her Notice of Appeal with three days remaining in the thirty-day window allowed by Rule (3)(c)(1). Defendants filed their Cross-Appeals within the ten-day window, after Plaintiff filed her Appeal, allowed by Rule 3(c)(3) but outside the generally applicable thirty-day window for giving notice of appeal. Accordingly, Plaintiff contends, because Defendants cross-appealed interlocutory orders not appealed by Plaintiff, Defendants were required to bring their Cross-Appeals in the thirty-day window prescribed by Rule 3(c)(1), not within the ten-day window allowed by Rule 3(c)(3). However, *Slaughter* is inapposite here.

¶ 26 *Slaughter* addressed family law issues where the plaintiff filed a claim for child custody, child support, and equitable distribution, and the defendant filed counterclaims for child custody, child support, equitable distribution, alimony, and attorney's fees. *Id.* at 432, 803 S.E.2d

at 421. The trial court entered orders for child support, alimony, and equitable distribution, and awarded attorney's fees to the defendant. *Id.* at 434, 803 S.E.2d at 422. The plaintiff appealed the equitable distribution and alimony orders near the end of the thirty-day window for appeals; the defendant filed a cross-appeal from the equitable distribution and child support orders after the original thirty-day window but within the ten-day window for cross-appeals. *Id.* The plaintiff filed a motion to dismiss the defendant's cross-appeal because the plaintiff did not appeal the child support order in his original appeal; the trial court denied the motion to dismiss. *Id.*

¶ 27 On appeal, the plaintiff argued the trial court erred in denying his motion to dismiss the defendant's cross-appeal. We agreed, reasoning that because the cross-appeal was taken from "*order[s] or judgment[s]*" and not the "entire proceeding" below, the plaintiff was not a party to the appeal from child support and the defendant was required to file her appeal within the thirty-day window for appeals. *Id.* at 444, 803 S.E.2d at 428. Although the issue was "novel" for this Court, we relied on our previous holding in *Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990), for guidance.

¶ 28 In S*urratt*, the plaintiff sued defendants—the plaintiff and third-party defendant in the related summary ejectment claim—for rent abatement and damages under claims of uninhabitable premises. One defendant filed for summary ejectment against the plaintiff, to which the plaintiff filed counterclaims and joined a third-party defendant. *Id.* at 400, 393 S.E.2d at 556. The trial court found for the plaintiff, and the defendant and third-party defendant moved for judgment notwithstanding the verdict. *Id.* at 401, 393 S.E.2d 557. The trial court denied the motions. *Id.* The defendant filed an appeal within the window allowed by Rule 3. The third-party defendant filed outside this window but claimed he had ten days to file an appeal after the plaintiff filed appeal. *Id.* On appeal, we reasoned, because the third-party defendant was not "an original party to th[e] action" and because defendant and third-party defendant were "charged with separate violations for separate time periods[,]" the third-party defendant's appeal "was totally unrelated and unaffected by the [defendant's] appeal[.]" As such, the third-party defendant was required to file his appeal within the window for appeals from judgments generally. *Id.* at 402, 393 S.E.2d at 557.

¶ 29 This case is factually distinct from both *Slaughter* and *Surratt*. Given the nature of the claims in *Slaughter*, the types of orders from which each party appealed were individually and immediately appealable even though the trial court retained jurisdiction over the entire

proceeding.[4] In this case, Defendants could not appeal the trial court's denial of their Motions to Dismiss because these Motions were interlocutory as they did not dispose of the case. *See Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990) ("Generally, there is no right of immediate appeal from interlocutory orders and judgments."); *see also Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court . . . ."). Moreover, the trial court dismissed Plaintiff's claim against Defendants in its Summary Judgment Orders. Thus, Defendants had no reason to file appeals from the Judgments as they won in the court below. The Orders here are of a different nature than the orders in *Slaughter*. Thus, unlike in *Slaughter*, the Cross-Appeals here are from the "entire proceeding" because the Orders did not dispose of the case and were not individually, immediately appealable.[5]

¶ 30 Additionally, unlike the "unrelated" claims against the parties in *Surratt*, Plaintiff's claims against Defendants alleged negligence stemming from the same set of operative facts—Plaintiff brought negligence claims against both Defendants, jointly and severally, in the original action and arising from the same factual allegations. Therefore, unlike in *Surratt*, Defendants' Cross-Appeals are related. *Surratt*, 99 N.C. App. at 402, 393 S.E.2d at 557. Thus, Rule 3(c)(3) applies to Defendants' Cross-Appeals. Defendants' Cross-Appeals were not time-barred and are properly before this Court. Accordingly, we deny Plaintiff's Motions to Dismiss Defendants' Cross-Appeals.

II. Dr. Rana's Cross-Appeal

¶ 31 **[2]** Dr. Rana appeals the trial court's denial of his Motion to Discontinue and Motion to Dismiss for lack of personal jurisdiction, insufficient

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4. Our General Statutes provide:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment . . . for absolute divorce, . . . child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment . . . but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2019).

5. Our analysis here leaves aside the separate question of whether Defendants were *required* to cross-appeal or may have instead raised their issues under N.C. R. App. P. 28(c) as alternative bases for affirming the trial court. N.C. R. App. P. 28(c) (2021).

process, insufficient service of process, and the statute of limitations. Dr. Rana filed his Answer to Plaintiff's 2014 Complaint on 13 March 2014. The Answer did not assert any defenses for insufficient process, service of process, or lack of personal jurisdiction. The Answer did assert Plaintiff failed to pay Defendants' costs after voluntarily dismissing her first Complaint pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure.

¶ 32 On 20 March 2014, Dr. Rana also filed a Motion to Tax Costs pursuant to Rule 41(d). Shortly after Dr. Rana filed the Motion to Tax Costs, the parties conferred, agreed on the amount Plaintiff was to pay, and Plaintiff paid the agreed amount. Consequently, the trial court never heard arguments on the Motion to Tax Costs.

¶ 33 On 4 April 2014, Dr. Rana filed an Amended Answer to Plaintiff's Complaint within the thirty-day window for parties to file amended pleadings as a matter of course. N.C. Gen. Stat. § 1A-1, Rule 15(a) (2019). Included in this Amended Answer were the defenses of insufficient process, insufficient service of process, and lack of personal jurisdiction. Dr. Rana asserted, at the time of the original Answer, Plaintiff had not yet properly served him. On 12 December 2016, the trial court heard arguments on Dr. Rana's Motion to Dismiss. The trial court entered an Order denying the Motion to Dismiss concluding Dr. Rana subjected himself to the trial court's jurisdiction by filing the Motion to Tax Costs and that the jurisdictional defenses did not relate back to Dr. Rana's original Answer and were, thus, waived.

¶ 34 Dr. Rana argues the trial court erred in denying the Motion to Dismiss because the Motion to Tax Costs did not constitute a general appearance conferring personal jurisdiction over Dr. Rana and because Rule 15(c) of our Rules of Civil Procedure allows defenses asserted in amended pleadings to relate back to original pleadings. We disagree.

¶ 35 We review a trial court's denial of a motion to dismiss de novo. *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 569 (2013). As such, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *Id.* Because Dr. Rana filed his Motion to Tax Costs after Plaintiff filed the 2014 Complaint but before Defendants filed their own Amended Answer, we address the issue of whether the Motion to Tax Costs constituted a general appearance conferring jurisdiction over Dr. Rana to the trial court.

¶ 36 Essentially, Dr. Rana argues his Motion to Tax Costs was a motion for payment to which he was already entitled. As such, Dr. Rana contends, the Motion was not a motion for relief in the cause before the trial

court and did not constitute a general appearance conferring jurisdiction to the trial court over Dr. Rana.

¶ 37 Our General Statutes allow trial courts to exercise personal jurisdiction, without service of process, over a party: "Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance . . . ." N.C. Gen. Stat. § 1-75.7(1) (2019). This Court has applied a "very liberal interpretation" of what constitutes a general appearance: "An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction." *Bullard v. Bader*, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) (citations omitted). Although "[m]ere presence in the courtroom" or "examination of the papers . . . is not enough" to confer jurisdiction, the test "is whether the defendant became an *actor in the cause*[.]" *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980) (citation and quotation marks omitted). Accordingly, when a party invokes the judgment of the trial court such that the party becomes an actor in the cause before objecting to personal jurisdiction, the party waives the objection. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 247-48, 243 S.E.2d 412, 413-14 (1978).

¶ 38 Here, it is true Dr. Rana was entitled to recover the costs associated with Plaintiff's voluntarily dismissed Complaint. N.C. Gen. Stat. § 1A-1, Rule 41(d) (2014). However, Rule 41(d) dictates that once a plaintiff files a second action against the same defendants, and the defendants then move to tax costs, the trial court *must* dismiss the case if the plaintiff does not comply with the order to tax costs. N.C. Gen. Stat. § 1A-1, Rule 41(d) (2014). Thus, a motion to tax costs, in this context, squarely affects the merits of the case because it invokes the trial court's authority to dispose of the case. *See Williams*, 46 N.C. App. at 789, 266 S.E.2d at 27. In effect, the General Assembly made a motion to tax costs, after a plaintiff has refiled a complaint, a jurisdictional issue requiring trial courts to dismiss actions when plaintiffs do not comply. Challenging subject-matter jurisdiction is a recognized act "amounting to a general appearance[.]" *Alexiou*, 36 N.C. App. at 248, 243 S.E.2d at 414. Therefore, Dr. Rana's Motion to Tax Costs constituted a general appearance in this action.

¶ 39 Nevertheless, Dr. Rana further argues his Amended Answer should relate back to the filing of his original Answer in this action and these Rule 12 defenses should be deemed interposed at the time of filing for his original Answer. However, the plain language of our statutory Rules of Civil Procedure expressly differentiates between claims and defenses.

See N.C. Gen. Stat. 1A-1, Rule 8(a)-(c) (2019) (differentiating "Claims for relief," "Defenses," and "Affirmative defenses"). Moreover, the relation back of amended pleadings under Rule 15(c) applies expressly to claims—not defenses. *See* N.C. Gen. Stat. 1A-1, Rule 15(c) (2019) ("A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."); *see also Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991) (When interpreting statutes, "under the doctrine of *expressio unius est exclusio alterius*, the expression of specific disqualifications *implies* the exclusion of any other disqualifications.").[6]

¶ 40 However, even if we were to apply Rule 15(c) to determine whether Dr. Rana's Amended Answer—including the personal jurisdiction, process, and service of process defenses—related back to his original Answer, Dr. Rana's original Answer would have had to allege facts putting Plaintiff on notice that Dr. Rana would raise these defenses. *See Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) ("[Rule 15(c)] speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading."). Here, Dr. Rana's original Answer did not allege any facts regarding personal jurisdiction, process, or service of process. Therefore, these defenses raised in Dr. Rana's Amended Answer would not relate back.

¶ 41 Accordingly, the trial court did not err in concluding Dr. Rana waived his process, service of process, and personal jurisdiction defenses in its Order denying Dr. Rana's Motion to Dismiss when these defenses were asserted only after Dr. Rana made a general appearance in the case. *Alexiou*, 36 N.C. App. at 248, 243 S.E.2d at 414.

¶ 42 Finally, with respect to Dr. Rana's Cross-Appeal, Dr. Rana argues the N.C. R. Civ. P. Rule 41(d)'s requirement a plaintiff taking a voluntary dismissal "shall be taxed with the costs of the action" constitutes a condition precedent to the re-filing of a new complaint within the one

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6. The Comment to Rule 15(c) provides additional support for this conclusion. *See* N.C. Gen. Stat. 1A-1, Rule 15 cmt. Section C. (2019) ("This section deals with the extremely difficult matter of determining when amendments should 'relate back' for statute of limitation purposes by posing the broad question of the relation between the new matter and the basic aggregate of historical facts upon which the original claim or defense is based. . . . The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved.").

year provided for under Rule 41(a)(1). *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2019) ("If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . ."). As such, Dr. Rana posits because Plaintiff did not pay costs prior to filing the 2014 Complaint, the 2014 Complaint should be deemed non-compliant with Rule 41(a)(1) and, thus, not receive the benefit of the one-year saving period. Thus, Dr. Rana reasons, in the absence of that saving period, Plaintiff's claims are barred by the statute of limitations.

¶ 43 On the Record before us, Dr. Rana, it appears, did not seek to have costs taxed against Plaintiff in the 2011 action but rather waited until Plaintiff filed the 2014 Complaint to do so. Contrary, however, to Dr. Rana's argument, the plain language of the applicable version of Rule 41(d), in effect since 1977[7], expressly contemplates just this scenario:

> A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action . . . If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed . . . the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

N.C. Gen. Stat. §1A-1, Rule 41(d) (2019). Thus, Rule 41(d) provides a plaintiff may file a new complaint under Rule 41 within the one-year saving period before paying the costs of the prior voluntarily dismissed action. However, the plaintiff must comply with any order requiring payment of those costs in the new action or, ultimately, face dismissal. Here, Dr. Rana filed his Motion to Tax Costs and the parties resolved the costs issue prior to the trial court ever reaching that issue. Dr. Rana's argument on this point is meritless. Consequently, the trial court's Order denying Dr. Rana's Motion to Dismiss is affirmed.

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7. Dr. Rana's argument on this point rests on decisions applying the earlier versions of the statutory rules in existence prior to 1977. *See*, *e.g.*, *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32 (1922); *Sims v. Oakwood Trailer Sales Corp.*, 18 N.C. App. 726, 198 S.E.2d 73 (1973) (applying *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 193 S.E.2d 362 (1972)).

III. Harnett Health's Cross-Appeal

¶ 44 **[3]** Harnett Health argues the trial court erred in denying its Motion to Dismiss pursuant to N.C. R. Civ. P. 9(j) because Dr. Leyrer—Plaintiff's sole Rule 9(j) expert—was not willing to testify against Harnett Health and could not have reasonably been expected to qualify as an expert witness regarding Harnett Health's emergency nurses. The trial court concluded Plaintiff facially complied with Rule 9(j) and "exercised reasonable care and diligence" in assuring her Rule 9(j) certification was true and that Plaintiff "reasonably expected" Dr. Leyrer to qualify as an expert witness and testify against Harnett Health. We agree with the trial court.

¶ 45 We review motions to dismiss pursuant to Rule 9(j) de novo. *Bluitt v. Wake Forest Univ. Baptist Med. Ctr.*, 259 N.C. App. 1, 3, 814 S.E.2d 477, 479 (2018). Under de novo review, this Court considers the issue anew and substitutes its own judgment for the trial court's judgment. *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Moreover, when reviewing Rule 9(j) motions to dismiss, we must view the relevant evidence in the light most favorable to the plaintiff. *Preston v. Movahed*, 374 N.C. 177, 186, 840 S.E.2d 174, 181 (2020).

¶ 46 Rule 9(j) states, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014).[8] "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice

8. Effective 1 October 2011, the General Assembly amended Rule 9(j) to also require Rule 9(j) experts to review "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry." We acknowledge Plaintiff's original

claims by requiring expert review *before* filing of the action." *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018) (quoting *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). Accordingly, trial courts determining compliance with Rule 9(j) should examine "the facts and circumstances known or those which should have been known to the pleader *at the time of filing*." *Preston*, 374 N.C. at 189, 840 S.E.2d at 183 (emphasis added) (citation and quotation marks omitted). However, trial courts should not "engage in credibility determinations and weigh competent evidence at th[e] preliminary stage of the proceedings." *Id.* at 190, 840 S.E.2d at 184 (citation omitted). "[T]o the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Id.* at 189, 840 S.E.2d at 184 (quoting *Moore*, 366 N.C. at 32, 726 S.E.2d at 817-18).

¶ 47 Here, Plaintiff's 2014 Complaint facially complied with Rule 9(j)(1)'s requirements as Plaintiff asserted the medical care and all medical records pertaining to the alleged negligence had been reviewed by a person reasonably expected to qualify as an expert under Rule 702 of the North Carolina Rules of Evidence, and the putative expert was willing to testify that the care provided by Defendants did not comply with the applicable standard of care. Moreover, Plaintiff's Rule 9(j) expert, Dr. Leyrer, provided an affidavit stating he reviewed the pertinent medical records and formed the opinion, as of 26 September 2011, that "the Defendants" violated the standard of care as set forth in Plaintiff's Complaint—Dr. Leyrer specifically incorporated Plaintiff's Complaint by reference. Dr. Leyrer further asserted he would be willing to testify "about the violation of the standard by the defendants[.]" Moreover, Dr. Leyrer's *curriculum vitae*, also incorporated by reference in his affidavit, stated he was then employed as an emergency physician and Director of Emergency Medicine at a Florida hospital.

¶ 48 Considering the facts at the time of filing in the light most favorable to Plaintiff, Plaintiff met the Rule 9(j) pleading requirements as to Harnett Health. First, Plaintiff reasonably expected Dr. Leyrer to qualify as an expert against Harnett Health as he was a practicing emergency physician at the time Plaintiff filed her Complaint. North Carolina Rule of Evidence 702(d) allows physicians, otherwise qualified under Rule 702(a), "who by reason of active clinical practice" have knowledge of the standard of care applicable to nurses to provide

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Complaint, filed one day before this change, would not have had to satisfy this requirement and only included a statement that Dr. Leyrer reviewed all the relevant "medical care" in this case. However, Plaintiff's 2014 Complaint does facially satisfy the amended statute.

expert testimony as to the relevant nursing standard of care. N.C. Gen. Stat. § 8C-1, Rule 702(d) (2014). It was reasonable for Plaintiff to expect Dr. Leyrer to qualify as an expert against Harnett Health because Plaintiff could have reasonably believed he would be able to testify as an expert as to Harnett Health nurses' standard of care.

¶ 49 Moreover, because Dr. Leyrer was a practicing emergency physician, he would have reasonably been expected to qualify as an expert regarding Dr. Rana's standard of care—and thus, Harnett Health's standard of care, as the Complaint alleged Dr. Rana was Harnett Health's agent under apparent authority. Rule 702(b) requires experts in medical malpractice cases to "[s]pecialize in the same specialty as the party against whom the testimony is offered" and to devote the majority of the expert's professional time to "active clinical practice in the same health profession in which the party against whom . . . the testimony is being offered[.]" *Id.*, Rule 702(b). Therefore, because both Dr. Leyrer and Dr. Rana were emergency physicians, Plaintiff could have reasonably expected Dr. Leyrer to qualify as an expert against Dr. Rana, and Harnett Health if Dr. Rana was Harnett Health's agent.

¶ 50 Harnett Health argues facts that came to light well after Plaintiff filed her Complaint establish Dr. Leyrer was not willing to specifically critique Harnett Health, and that Dr. Leyrer was, in fact, not an expert in emergency nursing. In an affidavit prior to Dr. Leyrer's deposition, and during the deposition, Dr. Leyrer stated he did not actually have any opinions or critiques as to whether Harnett Health breached the standard of care. Dr. Leyrer also stated that he never had any such opinions. Moreover, when asked about Harnett Health's nurses, Dr. Leyrer stated he was not an expert in emergency nursing care. However, considering the facts and circumstances at the time Plaintiff filed her Complaint—viewed in the light most favorable to Plaintiff—Harnett Health's arguments are not convincing.

¶ 51 First, the Record contains nothing to suggest Dr. Leyrer made any of these reservations known to Plaintiff before she filed either of her Complaints. In fact, Plaintiff's counsel submitted an affidavit asserting Dr. Leyrer stated he was willing to testify against all Defendants in a phone conversation prior to filing the 2011 Complaint. There is no evidence indicating Dr. Leyrer informed counsel that Dr. Leyrer was unwilling to testify against Harnett Health prior to his pre-deposition affidavit. To the extent Dr. Leyrer's deposition testimony creates a reasonable dispute regarding whether Plaintiff was aware of Dr. Leyrer's intent to ever offer an opinion as to Harnett Health's standard of care, at this preliminary stage we must draw all reasonable inferences in Plaintiff's favor.

Preston, 374 N.C. at 189, 840 S.E.2d at 184. Therefore, the Record indicates at the time Plaintiff filed her Complaint, she reasonably believed Dr. Leyrer was willing to testify against Harnett Health.[9]

¶ 52 Moreover, again based on Plaintiff's knowledge when she filed the Complaint, she would have reasonably believed Dr. Leyrer to qualify as an expert based on Rule 702. *See Moore*, 366 N.C. at 31, 726 S.E.2d at 817 ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry" than whether the witness actually qualifies.). Rule 702(d) only requires that a physician have knowledge of the standard for nursing care by means of the physician's clinical practice—Dr. Leyrer was a practicing emergency physician at the time Plaintiff filed the Complaint. Therefore, the trial court correctly concluded Plaintiff exercised reasonable diligence in assuring her Rule 9(j) certification was true and she reasonably believed Dr. Leyrer would qualify as an expert and testify as a witness against Harnett Health. Accordingly, the trial court did not err in denying Harnett Health's preliminary Motion to Dismiss.

IV. Dr. Rana's Rule 9(j) Motion to Dismiss

¶ 53 Next, turning to Plaintiff's Appeal, Plaintiff first contends the trial court erred in granting Dr. Rana's Rule 9(j) Motion to Dismiss.

¶ 54 With regard to Dr. Rana's Rule 9(j) Motion to Dismiss, the trial court concluded Dr. Leyrer did not review all of the medical records pertaining to the alleged negligence—required by Rule 9(j)—because he had not reviewed Plaintiff's "handwritten records" recounting the events leading to Decedent's death, the "EMT records" from Decedent's transport to the hospital on the occasions in question, and "certain prior medical records" pertaining to Decedent's health history. Moreover, the trial court concluded Dr. Leyrer was unfamiliar with the community in question and, therefore, Plaintiff could not reasonably expect him to qualify as an expert witness under Rule 702.

¶ 55 Again, as above, we review Rule 9(j) motions to dismiss de novo. *Bluitt*, 259 N.C. App. at 3, 814 S.E.2d at 479. We examine the reasonable-

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9. We acknowledge the seeming inconsistency arising from Dr. Leyrer's subsequent testimony. Here, however, we are analyzing this issue in light of Harnett Health's preliminary Rule 9(j) Motion and the trial court's ruling on Plaintiff's initial compliance with Rule 9(j). The issue of whether Dr. Leyrer should have been permitted to offer any opinions directly, in light of this testimony, is and was more properly addressed in the trial court's subsequent decision to exclude Dr. Leyrer's testimony, if any, against Harnett Health.

ness of Plaintiff's expectations based on her knowledge when she filed her Complaint. *Preston*, 374 N.C. at 189, 840 S.E.2d at 183. And, if there are reasonable disputes as to the facts, we should draw all reasonable inferences in Plaintiff's favor. *Id.* at 189, 840 S.E.2d at 184.

A. Plaintiff's notes as "medical records"

¶ 56 **[4]** The trial court concluded Dr. Leyrer failed to review all pertinent medical records, in part, because Dr. Leyrer did not review Plaintiff's own handwritten notes made after Decedent's death. Plaintiff contends the trial court erred in concluding her notes constituted medical records in the context of Rule 9(j).

¶ 57 Notably, there does not appear to be a clear definition of what constitutes "medical records" expressly applicable to or contemplated under Rule 9(j). In the absence of that clear definition, the North Carolina Medico-Legal Guidelines[10] provide a common-sense definition which may be equally understood by both legal and medical practitioners:

> Medical records are a collection of Health Information and the Designated Record Set for a particular individual whether created by a physician or other health care provider, as well as received from a physician or other health care provider.

North Carolina Bar Association, Medico-Legal Guidelines, Guideline II (2014).

¶ 58 Applying this definition makes good sense here. Indeed, this definition is also generally consistent with disparate definitions of medical records found in other statutory contexts. *See* Medico-Legal Guidelines App'x A-2 (" 'Medical Records' are defined by the following North Carolina statutory or regulatory provisions: N.C. Gen. Stat. § 8-44.1[,] N.C. Gen. Stat. § 90-410(2)[,] N.C. Gen. Stat. § 58-39-15(18)[,] N.C. Gen. Stat. § 130A-372[.]"). "Hospital medical records are defined for purposes

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10. "The North Carolina Medico-Legal Guidelines are the product of collaboration between the North Carolina Medical Society and North Carolina Bar Association. The Guidelines are the end-product of decades of cooperation between physicians and attorneys aimed at improving their inter-professional interactions in medical litigation." North Carolina Bar Association, Medico-Legal Guidelines, Guideline I (2014). Moreover, "[t]he Guidelines use a definition of 'medical records' that was agreed on by the North Carolina Medical Society and the North Carolina Bar Association. . . . The Guidelines attempt to create a common framework for the production of medical information maintained by physicians with respect to their patients and to further discussion between physicians and attorneys regarding the information sought and to be produced pursuant to a medical records release or subpoena." *Id.*

of this section . . . as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services . . . ." N.C. Gen. Stat. § 8-44.1 (2019). " 'Medical records' means personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, excluding X rays and fetal monitor records." N.C. Gen. Stat. § 90-410(2) (2019). " 'Medical records' means health data relating to the diagnosis or treatment of physical or mental ailments of individuals." N.C. Gen. Stat. § 130A-372 (2019). However, in the insurance context, " 'Medical-record *information*' " means personal information that: a. Relates to an individual's physical or mental condition, medical history, or medical treatment; and b. Is obtained from a medical professional or medical-care institution, from the individual, or from the individual's spouse, parent, or legal guardian." N.C. Gen. Stat. § 58-39-15(18) (2019) (emphasis added).

¶ 59 Here, Plaintiff's personal handwritten notes—while certainly potentially relevant information—do not constitute medical records because they were not created by a physician or other health care provider or from information provided by a physician or other health care provider.

¶ 60 Further, it appears the General Assembly in amending Rule 9(j) in 2011 intended to make clear, in order to qualify under Rule 9(j), a medical expert was required to review medical records and not just "medical care" generally. This appears to be a response, at least in part, to our Court's decision in *Hylton v. Koontz*, in which we held a Rule 9(j) expert was not required to review medical records but could simply qualify by reviewing the medical care provided, which in that case took the form of hypothetical facts provided by an attorney regarding the medical care. *Hylton v. Koontz*, 138 N.C. App. 511, 515-16, 530 S.E.2d 108, 110-11, *writ denied*, *rev. denied*, 353 N.C. 264, 546 S.E.2d 98 (2000). As such, applying the Medico-Legal Guideline definition is also consistent with the legislative intent to require Rule 9(j) experts to actually review the records of medical care created by the medical care providers providing that care and not relying on lay accounts of the medical care. Thus, the trial court erred in concluding Plaintiff's notes constituted medical records Dr. Leyrer was required to review under Rule 9(j).

B. EMT and Prior Medical Records

¶ 61 **[5]** The trial court also rested its ruling on Dr. Rana's Rule 9(j) Motion to Dismiss on its Finding Dr. Leyrer did not review the relevant EMT records or certain prior records concerning Decedent's related health conditions. Plaintiff contends the Record reflects Dr. Leyrer did review records relating the EMT reports and, further, that because Defendants'

acts and omissions during his 8 and 9 March 2010 visits to the hospital constituted medical malpractice; therefore, the medical records pertaining to Decedent's time in the hospital under Defendants' care are the pertinent medical records. Thus, Plaintiff argues, Dr. Leyrer had reviewed the pertinent medical records compliant with Rule 9(j). On the other hand, Dr. Rana maintains the EMT reports and Decedent's prior medical records and history would be pertinent to the medical care at issue in this case, and thus, their review is required to comply with Rule 9(j).

¶ 62 However, this Court has recognized:

> [I]t is not this Court's role in regard to ruling on a Rule 9(j) motion to determine the importance or weight of additional medical records or to rule on how "pertinent" the records of Plaintiff's diagnosis and treatment of [prior related conditions] may be to a determination of liability . . . that issue is a factual dispute to be addressed by medical experts and resolved by a jury[.]

Leonard v. Bell, 272 N.C. App. 610, 624, 847 S.E.2d 58, 67 (2020) (holding plaintiff's failure to provide his expert with medical records regarding prior tuberculosis screenings did not require dismissal under Rule 9(j) even when his claim asserted the physician's negligent treatment of his back pain caused the physician to miss the plaintiff's tuberculosis infection). Indeed, and more to the point, where there is a factual dispute at this preliminary stage over whether a medical malpractice expert reviewed the pertinent medical records related to an alleged medical malpractice claim, "it is not the role of the trial court or this Court, at this early stage in the case, to resolve any ambiguities or issues of fact against the Plaintiff. Instead, the trial court, and this Court, must view the evidence in the light most favorable to the plaintiff." *Id.* at 625, 847 S.E.2d at 68.

¶ 63 In this case, it is evident there are factual disputes over (1) whether Dr. Leyrer reviewed the EMT records, (2) whether Decedent's prior medical records were pertinent to the medical care he received from Defendants on 8 and 9 March 2010; and (3) whether and why Dr. Leyrer's opinions would or would not change based on his review and interpretation of those records. *See id.* These factual disputes notwithstanding, at this preliminary stage, drawing all inferences and viewing the evidence in the light most favorable to the Plaintiff, the trial court erred in granting Dr. Rana's Rule 9(j) Motion to Dismiss on this basis.

C. Dr. Leyrer's Familiarity with the Community to Comply with Rule 9(j)

¶ 64 **[6]** Next, the trial court determined Dr. Leyrer did not review the relevant demographic information for Dunn, North Carolina for the relevant time frame because the demographic information he reviewed was from 2013-2015 and not 2009-2010. Thus, the trial court concluded Plaintiff could not have reasonably expected him to qualify as an expert because he was not familiar with the standard of care in Dunn, North Carolina at the time of the alleged malpractice.

¶ 65 N.C. Gen. Stat. § 90-21.12(a) provides:

> [I]n any medical malpractice action as defined in G.S. 90-21.12(a), the defendant health care provider shall not be liable for the payment of damages unless *the trier of fact* finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances *at the time of the alleged act* giving rise to the cause of action[.]

N.C. Gen. Stat. § 90-21.12(a) (2019)(emphasis added).

¶ 66 However, the Record here reflects Dr. Leyrer *did* review demographic information about Harnett Health as it existed in 2009-2010, including statistics reported in the hospital's licensure renewal application and demographic information for the City of Dunn and Harnett County, albeit from 2013-2015, but which included census data from 2010.

¶ 67 Moreover, our Court has recognized a proffered medical expert witness who had previously testified to a lack of familiarity with the relevant community and applied a national standard of care, but later supplemented his knowledge of the relevant community after deposition, was nevertheless qualified to testify as an expert as to the standard in that community. *Roush v. Kennon*, 188 N.C. App. 570, 576, 656 S.E.2d 603, 607 (2008). Thus, it was not unreasonable for Plaintiff to expect Dr. Leyrer would supplement any purported deficiency in his familiarity with the Dunn community or applicable standard of care. Therefore, the trial court should not have granted Dr. Rana's Rule 9(j) Motion to Dismiss where Dr. Rana failed to establish Plaintiff could not have reasonably expected Dr. Leyrer to qualify under Rule 702 and N.C. Gen.

Stat. § 90-21.12 when Plaintiff filed the 2014 Complaint. Consequently, the trial court erred in granting Dr. Rana's Rule 9(j) Motion to Dismiss.

V. Excluding Plaintiff's Expert Witnesses

¶ 68 Independent of the analysis under Rule 9(j) as to whether Plaintiff reasonably expected Dr. Leyrer to qualify, is the question of whether Plaintiff's proffered experts should, in fact, be qualified to testify as expert witnesses. Indeed, the trial court separately granted Defendants' Motions to exclude both Dr. Leyrer and Dr. Harris as Plaintiff's expert witnesses. Generally, we review a trial court's ruling on a motion to exclude expert testimony for an abuse of discretion. *Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 628-29 (2009). "However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review." *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020).

A. Dr. Leyrer

¶ 69 **[7]** On 23 April 2019, the trial court entered two separate Orders granting Defendants' Motions to Exclude Dr. Leyrer. The trial court found Dr. Leyrer only reviewed 2015 data about the hospital from its website. The trial court also again found Dr. Leyrer reviewed demographic information about the Dunn community "from the years 2013-2015." As the alleged negligence occurred in 2010, the trial court again concluded: "The information and data [Dr. Leyrer] studied and considered in his opinion were not at the time of the alleged act giving rise to the cause of action pursuant to N.C. Gen. Stat. 90-21.12." Additionally, as it related to any potential opinion testimony against Harnett Health and its employees, the trial court found as an additional basis to exclude Dr. Leyrer, Dr. Leyrer testified in his deposition he was not an emergency nursing expert and that he had no standard of care "criticisms or opinions relating to the care provided by any of the nurses or personnel at Harnett Health." Accordingly, the trial court granted Defendants' Motions.

¶ 70 Plaintiff argues the trial court erred in excluding Dr. Leyrer as an expert witness because he did not review sufficient data about the Dunn community, Harnett Health, and Dr. Rana at the time of the alleged negligence—again, we agree.

¶ 71 First, by its language, N.C. Gen. Stat. § 90-21.12 requires the trier of fact to find defendants breached the standard of care in the same or similar communities under the same or similar circumstances at the time of the alleged negligent act. As long as plaintiffs' experts demonstrate

"specific familiarity with and expressed unequivocal opinions regarding the standard of care" in the relevant community, the trial court should not exclude those experts' testimony. *Crocker*, 363 N.C. at 146, 675 S.E.2d at 630. "The 'critical inquiry' . . . is 'whether the doctor's testimony, taken as a whole' establishes that he is 'familiar with a community . . . in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of [that] community.' " *Kearney v. Bolling*, 242 N.C. App. 67, 76, 744 S.E.2d 841, 848 (2015) (quoting *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005)).

¶ 72 Here, the trial court disqualified Dr. Leyrer because it determined the data he reviewed were from a few years after the time of the alleged negligence. Indeed, when the record indicates an expert has *only* reviewed information regarding the relevant hospital and community from several years after the incident in question, "[w]e cannot assume . . . that the resources and standard of care remained unchanged[.]" *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 480-81, 624 S.E.2d 380, 385 (2006).

¶ 73 However, the Record indicates both Dr. Leyrer and Dr. Harris reviewed sufficient, relevant information regarding the Dunn community and Harnett Health from 2010. Specifically, Dr. Leyrer's Affidavit states that he reviewed: Dr. Rana's education, training, and experience; the "description of the quality of facilities and equipment available" at Harnett Health "contained in [Harnett Health's] 2010 Hospital License Renewal Application"; and 2010 demographic information showing Harnett County had a population of 114,678, Dunn had a population of 9,310, and Harnett County's racial composition at the time. Dr. Leyrer's Affidavit states that he has practiced in hospitals with similar resources and in communities of similar size to Dunn and Harnett County. Moreover, Dr. Leyrer testified he "trained at Wake Forest University" and "went to undergraduate school" there as well. He also testified he was "familiar with North Carolina intimately" and he practices "in a similar-size town" to Dunn.

¶ 74 Therefore, unlike in *Purvis*, the Record indicates Dr. Leyrer based his knowledge of the standard of care in Dunn or similar communities, at the time of the alleged negligence, through his own investigation of Harnett Health, Dunn, and Harnett County and "his testimony as to the similarity in the communities where he has practiced[.]" *Pitts*, 167 N.C. App. at 199, 605 S.E.2d at 157 (holding the trial court abused its discretion where the trial court concluded the expert's trial testimony did not satisfy N.C. Gen. Stat. § 90-21.12's requirements); *see also Crocker*,

363 N.C. at 146, 675 S.E.2d at 630-31 (distinguishing *Purvis* because, in *Crocker*, the expert's "subsequent affidavit expanded and clarified his familiarity with [the defendant's] practice and with [the relevant community]."). Consequently, because the Record reflects Dr. Leyrer had, in fact, reviewed relevant data from the time of the alleged negligent act, the trial court abused its discretion in disqualifying Dr. Leyrer as to Dr. Rana. *Pitts*, 167 N.C. App. at 199, 605 S.E.2d at 157.

¶ 75 However, as it relates to Harnett Health, the trial court's Order excluding Dr. Leyrer also rests on Dr. Leyrer's testimony he was not an emergency nursing expert and that he had no criticisms or opinions as to the hospital or its staff. Plaintiff does not contest this aspect of the trial court's Order granting Harnett Health's Motion to Exclude Dr. Leyrer. Thus, we conclude the trial court properly excluded Dr. Leyrer as an expert witness against Harnett Health directly as it relates to any "criticisms or opinions relating to the care provided by any of the nurses or personnel at Harnett Health."[11]

B. Dr. Harris

¶ 76 **[8]** On 4 October 2019, the trial court granted Defendants' Motions to Exclude and Disqualify Dr. Harris. As with Dr. Leyrer, the trial court reasoned Dr. Harris failed to establish he was familiar with the standard of care in the Dunn community and at Harnett Health "at the time of this incident as required by N.C. Gen. Stat. § 90-21.12." The trial court erred in disqualifying Dr. Harris for the same reasons as it erred in disqualifying Dr. Leyrer as explained above.

¶ 77 However, the trial court also disqualified Dr. Harris because he did not "review the plaintiff's handwritten notes, certain EMT records, or certain prior medical records before forming his opinions," thus violating Rule of Evidence 702(a)'s requirements: (1) expert opinions be based upon sufficient facts or data; (2) expert opinions are the product of reliable principles and methods; and (3) that the witness applied the principles and methods reliably to the facts of the case. Plaintiff argues the trial court misapplied Rule 702(a) in excluding Dr. Harris as an expert witness—again, we agree.

¶ 78 Rule 702(a) of the North Carolina Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence

11. If and to the extent, however, Plaintiff has a viable claim Dr. Rana was an apparent agent of Harnett Health, this would not preclude Dr. Leyrer from proffering opinions as to Dr. Rana in that context against Harnett Health.

> or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). These three subsections constitute our "three-pronged reliability test" under the Rules of Evidence. *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, . . . not on the conclusions that they generate[.]" *Id.* (citations and quotation marks omitted).

¶ 79 As the trial court excluded Dr. Harris because he had not reviewed Plaintiff's notes, Decedent's EMT records, and Decedent's "certain prior medical records," it would appear the trial court concluded Dr. Harris could not satisfy Rule 702(a)(1)'s requirement his testimony be based on sufficient facts or data. "[A]s a general rule, questions relating to the bases and sources of an expert's opinion affect only the *weight to be assigned* that opinion rather than its *admissibility*." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015) (emphasis added) (citations and quotation marks omitted). " '[S]ufficient facts or data' means that the expert considered sufficient data to employ the methodology." *Id.* (citation and quotation marks omitted).

¶ 80 Rule 702(b) and N.C. Gen. Stat. § 90-21.12(a) govern the methodology applicable to expert testimony regarding the appropriate standard of care in medical malpractice cases. As explained above, the Record does not support the trial court's conclusion Dr. Harris failed to satisfy § 90-21.12(a)'s requirement he be familiar with the standard of care in Dunn or a similar community. Likewise, the Record fails to support the trial court's determination Dr. Harris, a practicing emergency room physician who devoted the majority of his practice to emergency room care in the previous year, failed to satisfy Rule 702(b). To the contrary, Dr. Harris examined the medical records from Harnett Health for the two hospital visits in question as well as at least some of Decedent's prior medical records. In fact, Dr. Harris

was familiar with Decedent's medical history and certain medical conditions relevant to his care on the days in question. Therefore, the trial court misapplied Rule 702(a) by concluding Dr. Harris's opinions were not based on sufficient data when his opinions were supported by evidence in the Record. *See id.* at 375, 770 S.E.2d at 711 ("Because all these facts are supported by the record, . . . [the expert's] failure to take other data into account—go[es] to the weight of the report, not its admissibility.") (citation and quotation marks omitted). Consequently, the trial court erred in concluding Dr. Harris's opinions were inadmissible and, instead, questions as to the weight to be given to his opinions should be resolved by a jury.

VI. Summary Judgment

¶ 81 **[9]** On 4 October 2019, "upon hearing the arguments of counsel and upon a review of the file and all materials submitted in support and in opposition," the trial court granted Defendants' Motions for Summary Judgment after excluding Plaintiff's expert witnesses as the trial court found no genuine issues of material fact as to "the applicable standard of care, liability, proximate causation, plaintiff's contributory negligence, damages and agency."

¶ 82 We review the trial court's grant of Summary Judgment de novo. *DeBaun v. Kuszaj*, 238 N.C. App. 36, 38, 767 S.E.2d 353, 355 (2014). A trial court should enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The moving party may meet its burden by: "proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of [the party's] claim. All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Gaines ex rel. Hancox v. Cumberland Cnty. Hosp. Sys., Inc.*, 203 N.C. App. 213, 218, 692 S.E.2d 119, 122 (2010).

¶ 83 Medical negligence plaintiffs "must offer evidence that establishes the following essential elements: (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 303, 704 S.E.2d 540, 543 (2011) (citation and quotation marks omitted).

¶ 84 It is apparent in the context of the Record before us that the trial court found no genuine issue of material fact regarding Defendants' standard of care, whether Defendants breached that standard, and causation because it had excluded both of Plaintiff's expert witnesses. *See id.* ("Whether medical negligence plaintiffs can show causation depends on experts."). Because we reverse the trial court's Orders excluding Dr. Harris's testimony against Dr. Rana and Harnett Health and Dr. Leyrer's testimony against Dr. Rana, we also vacate the trial court's Summary Judgment Order.

¶ 85 Defendants, however, argue, even if the trial court erred in excluding Plaintiff's expert witnesses, Defendants are still necessarily entitled to judgment as a matter of law because Plaintiff has failed to establish genuine issues of material fact as to causation, contributory negligence, and agency. We disagree as any resolution of those issues would necessarily require the trial court to consider Plaintiff's expert testimony, which it had previously excluded. Consequently, we remand to the trial court for further proceedings regarding these issues, including any further proceedings necessary on Defendants' Summary Judgment Motions.

Conclusion

¶ 86 For the foregoing reasons, we: (I) affirm the trial court's denial of Dr. Rana's Motion to Dismiss; (II) affirm the denial of Harnett Health's Rule 9(j) Motion to Dismiss; and (III) reverse the Order granting Dr. Rana's Rule 9(j) Motion to Dismiss. Additionally, (IV) we reverse the Order granting Dr. Rana's Motion to Exclude Dr. Leyrer, but affirm the Order granting Harnett Health's Motion to Exclude Dr. Leyrer's testimony as against Harnett Health directly; and (V) reverse the Orders granting Defendants' Motions to Exclude Dr. Harris. Accordingly, and finally, (VI) we also vacate the Order granting Summary Judgment to Defendants and remand the case to the trial court for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART, AND REMANDED.

Judges CARPENTER and JACKSON concur.

MURRAY v. DEERFIELD MOBILE HOME PARK, LLC

[277 N.C. App. 480, 2021-NCCOA-213]

CHRISTOPHER D. MURRAY, PLAINTIFF
v.
DEERFIELD MOBILE HOME PARK, LLC AND DONALD W. LEWIS, DEFENDANTS

No. COA20-382

Filed 18 May 2021

1. Contracts—validity—severability—consideration—real estate

In a breach of contract action concerning an agreement to sell three parcels of defendants' real estate, the trial court properly granted summary judgment in favor of defendants because there was no valid contract to sell any of defendants' real estate. The first agreement was not a valid contract because one of the parcels could not be conveyed without joinder of defendant's wife, and that contract was not severable because it was a lump sum agreement. The amended option agreement also was not a valid contract because it did not require defendants to convey the property by a specific date and was not supported by valuable consideration.

2. Fraud—constructive—fiduciary relationship—allegations—real estate

In a breach of contract action concerning an agreement to sell three parcels of defendants' real estate, the trial court properly granted summary judgment in favor of plaintiff on defendants' counterclaims for constructive fraud and breach of fiduciary duty where defendants did not allege that plaintiff held himself out to be a real estate broker or in any confidential relationship with defendants.

3. Civil Procedure—motion to amend—futility—actual fraud

In a breach of contract action concerning an agreement to sell three parcels of defendants' real estate, the trial court did not abuse its discretion by denying defendants' motion to amend their counterclaim to include new claims based upon a premise of actual fraud where such amendment would have been futile. Defendants failed to assert a sufficient allegation or make a showing of any reasonable reliance upon false representations by plaintiff.

Appeal by plaintiff and cross-appeal by defendants from order entered 13 November 2019 by Judge Andrew T. Heath in Pender County Superior Court. Heard in the Court of Appeals 14 April 2021.

Hatch, Little & Bunn, L.L.P., by Justin R. Apple and David M. Yopp, for plaintiff-appellant/cross-appellee.

Reiss & Nutt, PLLC, by W. Cory Reiss, for defendant-appellees/cross-appellants.

TYSON, Judge.

¶ 1 Christopher D. Murray ("Plaintiff") appeals from an order entered granting Deerfield Mobile Home Park, LLC ("Deerfield") and Donald W. Lewis' ("Defendant") (collectively "Defendants") motion for summary judgment under North Carolina Rule of Civil Procedure 56. Defendants' cross-appeal asserts the trial court erred in granting Plaintiff's motion for summary judgment on Defendants' claims under North Carolina Rule of Civil Procedure 56. We affirm the trial court's orders.

I. Background

A. Defendants' Properties

¶ 2 Defendant and wife, Norean G. Lewis, purchased 7.09 acres of land in Pender County as tenants by the entirety in April 1978. These 7.09 acres are located at 12165 U.S. Highway 117 South. The Lewises moved into a house on the 7.09-acre parcel in 1983. Defendant began leasing mobile homes located on the parcel in 1984.

¶ 3 In 2005, Defendant formed Deerfield Mobile Home Park, LLC as a single-member North Carolina limited liability company to operate the mobile home park. Deerfield's operating agreement lists Donald Lewis as its sole member and manager. The Lewises subdivided the original 7.09 acres into two separate parcels.

¶ 4 The subdivision of the 7.09 acres was completed pursuant to a plat map and deed recorded in the Pender County Registry on 24 February 2006. The new parcels were a 5.355-acre parcel containing the Deerfield Mobile Home Park and the 1.721 acres containing the Lewises' home.

¶ 5 In 2006, the Lewises conveyed the 5.355 acres containing the Deerfield Mobile Home Park to Deerfield. Defendant owns nineteen of the mobile homes in the Deerfield Mobile Home Park in his individual capacity. The Lewises' home on the 1.721-acre parcel remained owned as tenants by the entirety.

¶ 6 Defendant purchased a 4.93-acre parcel while married to Mrs. Lewis, containing a single-family rental unit accessible only via a private dirt road at 4655 Carolina Beach Road in New Hanover County. This property is leased for $650 per month. Mrs. Lewis holds a marital interest in the property. Defendant could only convey his interest subject to

Mrs. Lewis' marital interest, without joinder of her signature. *See* N.C. Gen. Stat. § 39-9 (2019); *Hughes v. Hughes*, 102 N.C. 236, 102 N.C. 262, 9 S.E. 437, 9 S.E. 437 (1889).

¶ 7 Defendant was diagnosed with terminal lung cancer in June 2018. Around August 2018 Defendant approached Plaintiff at a restaurant, disclosed his cancer diagnosis, and stated his desire to sell the 5.355-acre Deerfield parcel, the 1.721-acre parcel containing the personal residence, and the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road.

B. Plaintiff's involvement

¶ 8 Plaintiff is in the business of buying and developing real property. He is not a licensed real estate broker. Defendant desired to retain a life estate in the 1.721-acre parcel containing the personal residence along with a transition period for Mrs. Lewis to continue to live there after his death. Defendant told Plaintiff he wanted a combined sum of $1,500,000 for the three properties.

¶ 9 Plaintiff proposed a sale of the three properties to Robert Huckabee. Plaintiff had arranged previous real estate transactions with Huckabee, and he knew Huckabee had owned at least one other mobile home park. Plaintiff "was going to represent [Defendant's] interests" negotiating with Huckabee. Plaintiff never represented himself to be a real estate broker. Defendant acknowledges he had no special relationship with Plaintiff. Plaintiff was to receive a $10,000 consulting fee for negotiating the deal with Huckabee.

¶ 10 Plaintiff encouraged Defendant to obtain formal appraisals of the three properties prior to selling, but Defendant declined to procure appraisals because he "knew what [he] paid for it, and [he] kn[ew] what [he] want[ed] to sell it for." Defendant believed based upon Plaintiff's "judgment and experience" in selling real estate the "market . . . would bring his asking price."

¶ 11 Defendant described Plaintiff's role as follows:

> I trusted [Plaintiff] to be looking out for my best interests, as he had said he was doing, and I trusted that he was using his greater knowledge about real estate to make sure I got true market value. [Plaintiff] said he was my consultant on selling the properties to [Huckabee] for the best price I could get.

¶ 12 Huckabee informed Plaintiff he was interested in purchasing the three properties. The men conducted a site visit of Deerfield Mobile Home Park. Plaintiff informed Defendant of Huckabee's interest in the three properties. Plaintiff negotiated terms of the sale during subsequent visits with Defendant. Defendant agreed to a lump sum price of $1,060,000 to sell all three properties.

¶ 13 Defendant prepared a one-page document memorializing their agreement to the transaction entitled "Agreement to Sell Properties." On 6 October 2018, Defendant and Plaintiff both signed the one-page document. The "Agreement to Sell Properties" included the 5.355-acre parcel containing the Deerfield Mobile Home Park, the 1.721-acre parcel containing the Lewises' personal residence, and the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road. The "Agreement to Sell Properties" provided for payment of Plaintiff's $10,000 consulting fee, monthly rental of the Lewises' residence after closing, and a transition time for Mrs. Lewis following Defendant's death.

C. Amendments to Agreement

¶ 14 Huckabee did not believe the "Agreement to Sell Properties" was binding on the parties. He had an agent draft a "legitimate real estate agreement." Huckabee also informed Plaintiff he did not want to purchase the 4.93-acre parcel containing the single-family rental unit on Carolina Beach Road in New Hanover County. Huckabee requested Plaintiff to ask Defendant to separate the purchase prices of the properties in the "Agreement to Sell Properties." Defendant agreed to list separate purchase prices of the properties in a 17 October 2018 document, wherein handwritten prices were affixed to each property listed on the "Agreement to Sell Properties." The 17 October 2018 document priced the 5.355-acre parcel containing the Deerfield Mobile Home Park and the 1.721-acre parcel containing the personal residence at $750,000, and priced the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road at $300,000.

¶ 15 Plaintiff and Huckabee stopped communicating about the transaction. Plaintiff believed Huckabee did not want to complete the transaction due to an unrelated dispute between the two men. Huckabee believed Plaintiff had informed him Defendant's daughter "wanted to stop this transaction. She had another real estate [broker] involved and another buyer[.]"

¶ 16 Huckabee maintained in his deposition he continued to have interest in the properties and would be able to purchase all three properties in October 2018. After Plaintiff informed Huckabee that Defendant was

no longer interested in selling to him, Huckabee heard nothing more about the transaction until being subpoenaed for a deposition.

¶ 17 Plaintiff informed Defendant that Huckabee had stopped responding and asserted Huckabee was no longer interested in purchasing the properties. Defendant responded by reiterating his need to sell the properties as quickly as possible. Defendant asked Plaintiff "how fast [could he] get him some big money." When Plaintiff asked what amount constituted "big money," Defendant responded "$500,000 or more."

¶ 18 Plaintiff told Defendant he would require seller financing to purchase the properties. Defendant told Plaintiff he would consider some seller financing. Plaintiff responded he would also confer with other lenders about financing the purchase. Plaintiff also asked for a year's extension to pay the full amount. A short time later, Defendant informed Plaintiff he was not interested in seller financing and inquired if Plaintiff could pay the full amount in a shorter time due to his terminal prognosis. Defendant provided financial information and tax returns from Deerfield for lenders to review.

D. Hoosier Daddy, LLC

¶ 19 Plaintiff contacted Jack J. Carlisle to determine whether he was interested in purchasing the three properties. Carlisle informed Plaintiff he was willing to purchase the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road and would finance Plaintiff's purchase of the 5.355-acre parcel containing the Deerfield Mobile Home Park and the 1.721-acre parcel containing the personal residence. Carlisle gave Plaintiff a check from a limited liability company, Hoosier Daddy, LLC for $800,000. The check required the signatures of Plaintiff, Defendant, and an attorney to be negotiated.

¶ 20 Plaintiff met with Defendant on 24 October 2018. Plaintiff offered to purchase all three properties for $800,000 and handed Defendant the check from Hoosier Daddy. Plaintiff had written on a copy of the 17 October 2018 document, during the meeting as values for the properties: $400,000 for 5.355-acre parcel containing the Deerfield Mobile Home Park, $250,000 for the 1.721-acre parcel containing the personal residence, and $250,000 for the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road, totaling $900,000. Beneath the values, Plaintiff wrote "Will accept 5% less/purchase price $850,000." Defendant and Plaintiff both signed the bottom of this document. Plaintiff believed this document gave him the option to buy all three properties or just some of them at the listed price or 5% less.

¶ 21 Plaintiff returned on 7 November 2018 with a proposed contract. Plaintiff told Defendant he could not obtain more than the $800,000 check from Hoosier Daddy. Defendant told Plaintiff "we can't do business. You're . . . trying to squeeze me too much. We can't do business."

E. Listing with a Broker

¶ 22 Defendant hired a licensed real estate broker to list the 5.355-acre parcel containing the Deerfield Mobile Home Park and the 1.721-acre parcel containing the personal residence for sale. This broker presented an offer from another prospective buyer.

¶ 23 Defendant wanted to sell the 1.721-acre parcel containing the marital residence together with the Deerfield Mobile Home Park. Defendant believed the combined sale of the properties would provide the best value for his residence, another buyer of the house alone would not pay as much to be in front of a mobile home park, and the 1.721 acres provided expansion room for the new owner of the Deerfield Mobile Home Park. Defendant reiterated to Plaintiff they would not be closing on the sale of any properties.

F. Litigation

¶ 24 Plaintiff filed a complaint on 17 January 2019, asserting breach of contract against Defendants. Plaintiff docketed a notice of *Lis Pendens* with the complaint in Pender County Superior Court concerning the 5.355-acre parcel containing the Deerfield Mobile Home Park and the 1.721-acre parcel containing the Lewises' personal residence.

¶ 25 Plaintiff also filed a complaint on 17 January 2019 asserting breach of contract concerning the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road in New Hanover County Superior Court. The action in New Hanover County Superior Court is being held in abeyance pending resolution of this case.

¶ 26 Defendants filed counterclaims asserting constructive fraud, undue influence, and duress, and sought recission of the contract. Both Plaintiff and Defendants filed motions for summary judgment. The trial court entered an order granting Defendants' motion for summary judgment on Plaintiff's claims and granting Plaintiff's motion for summary judgment on Defendant's counterclaims on 13 November 2019. Plaintiff appeals. Defendants cross-appeal.

II. Jurisdiction

¶ 27 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

¶ 28 Plaintiff argues the trial court erred by granting Defendants' motion for summary judgment and by denying his motion for summary judgment and for specific performance of the contract.

¶ 29 Defendants argue the trial court erred by granting Plaintiff's motion for summary judgment on the counterclaims. Defendants further argue the trial court abused its discretion and erred by denying their proposed amendments to the counterclaims.

IV. Cross Motions for Summary Judgment

A. Standard of Review

¶ 30 North Carolina Rule of Civil Procedure 56(c) entitles a movant to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" shows there is "no genuine issue as to any material fact" and the movant is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

¶ 31 A genuine issue of material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

¶ 32 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). A party may meet this burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

¶ 33 When the court reviews the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Plaintiff's Appeal: Defendant's Motion for Summary Judgment

1. Validity of Contract

¶ 34 **[1]** Plaintiff argues the trial court erred by granting Defendants' motion for summary judgment. He asserts the parties formed a severable contract that complies with the statute of frauds and the 24 October 2018 document is sufficient to satisfy the statute of frauds. N.C. Gen. Stat. § 22-2 provides:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (2019).

¶ 35 Plaintiff concedes Defendant, as a tenant by the entirety, could not convey the 1.721-acre parcel containing the personal residence without joinder of his wife. Plaintiff asserts 24 October 2018 document is severable from the 4.93-acre parcel containing the single-family rental unit at 4655 Carolina Beach Road, which forms the New Hanover County case, and for sale of the 5.355-acre parcel containing the Deerfield Mobile Home Park.

¶ 36 "The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016) (citation omitted). "A contract is simply a promise supported by consideration, which arises . . . when the terms of an offer are accepted by the party to whom it is extended." *McLamb v. T.P., Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation omitted). "Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract." *Orthodontic Ctrs. Of Am., Inc. v. Hanachi*, 151 N.C. App. 133, 135, 564 S.E.2d 573, 575 (2002) (citation omitted).

¶ 37 "The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968) (citations omitted).

¶ 38 "One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing." *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986).

¶ 39 One hundred and thirty years ago, our Supreme Court examined the severability of a contract with unenforceable provisions, holding:

> A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety, and the purchaser will be liable for the entire sum agreed to be paid. And so, also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud.
>
> . . .
>
> "[A] severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.

Wooten v. Walters, 110 N.C. 251, 254-55, 14 S.E. 734, 735 (1892).

¶ 40 Plaintiff argues the 24 October 2018 amended agreement constituted a valid and severable contract to convey. This document listed and assigned separate prices to each of the three properties. The document is signed by Defendant and Plaintiff. Defendants argue the 24 October 2018 agreement does not constitute a valid contract.

¶ 41 "The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Snyder v. Freeman*, 300 N.C 204, 218, 266 S.E.2d 593, 602 (1980). Our

Supreme Court has held: "For an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) (citations and internal quotation marks omitted).

2. Unilateral Option Agreement

¶ 42 "[A]n option is a contract by which the owner agrees to give another the exclusive right to buy property at a fixed price within a specified time. In effect, an owner of property agrees to hold his offer [to sell] open for a *specified period of time*." *Normile v. Miller*, 313 N.C. 98, 105, 326 S.E.2d 11, 16 (1985) (emphasis supplied) (citations and internal quotation marks omitted).

a. Specified Date

¶ 43 The writing must contain an express "promise or agreement that [the offer will] remain open for a specified period of time" for an option contract to be valid. *Id.* An option contract does not exist if "there is no language indicating that [the seller] in any way agreed to sell or convey [their] real property to [a prospective buyer] at their request within a *specified period of time*." *Id.* at 106, 326 S.E.2d at 16 (emphasis supplied).

¶ 44 The 24 October 2018 agreement contains no provisions requiring Defendants to convey the listed properties by a specific date. Nothing required Plaintiff to actually purchase any single or combination of the three properties. Nothing shows the 24 October 2018 document represented anything more than a revocable offer to sell that Defendants could revoke at any period of time prior to acceptance according to its terms.

b. Consideration

¶ 45 "[An] option contract must also be supported by valuable consideration." *Id.* at 105, 326 S.E.2d at 16. The 24 October 2018 agreement along with Plaintiff's pleadings, depositions, and affidavits do not provide for any consideration. The record is devoid of language for any deposit, due diligence fee, or earnest money deposit paid by Plaintiff for Defendant to forebear selling his properties. No valid option contract existed to which Plaintiff could allege a breach thereof by Defendants.

¶ 46 Without a valid and enforceable option contract, no claim for breach of contract arises. The trial court properly entered summary judgment

for Defendants on Plaintiff's breach of contract claims. Plaintiff's arguments are overruled.

C. Defendants' Appeal: Plaintiff's Motion for Summary Judgment

¶ 47 **[2]** Defendants argue the trial court erred by granting Plaintiff's motion for summary judgment and assert their claims of undue influence, duress, fraud, and for recission of the documents raise genuine issues of material fact to preclude summary judgment for Plaintiff. We have held no enforceable contract exists between the parties, Defendants counterclaims for undue influence, duress, and recission are therefore moot.

1. Fraud

¶ 48 Fraud may be actual or constructive. *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). Constructive fraud arises when a confidential or fiduciary relationship exists. *Id.* at 83, 273 S.E.2d at 677.

¶ 49 "Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by our liberal rules of notice pleading." *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citations and internal quotation marks omitted). Rule 9(b) of the North Carolina Rules of Civil Procedure require that "[i]n all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2019).

¶ 50 Our Supreme Court has held Rule 9(b)'s particularity requirement for a fraud claim "is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry*, 302 N.C. at 85, 273 S.E.2d at 678.

¶ 51 "[A] fiduciary relationship is generally described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire v. Bank of Am. N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citation and internal quotation marks omitted).

¶ 52 Allegations of fraud are rarely resolved at the pleading or summary judgment stage, because resolution of the cause requires the determination of a litigant's state of mind. *Whitman v. Forbes*, 55 N.C. App. 706, 713, 286 S.E.2d 889, 893 (1982) (citations omitted).

¶ 53 "In the event that a party fails to allege any special circumstances that could establish a fiduciary relationship, dismissal of a claim which hinges upon the existence of such a relationship would be appropriate."

Azure Dolphin, LLC. v. Barton, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018) (citations and internal quotation marks omitted).

¶ 54 Defendants have not alleged Plaintiff held himself out to be a real estate broker or in any confidential relationship with Defendants. Defendants allege Plaintiff was an advisor, consultant, and deal maker due to his superior knowledge and experience regarding real property values and transactions. Defendants further allege the existence of a *de jure* fiduciary relationship. Defendants did not assert this argument before the trial court and have waived it for appellate review. *See* N.C. R. App. P. 10.

¶ 55 In *Azure Dolphin*, the plaintiff argued a party acting as a real estate investment expert and advisor created a fiduciary relationship. *Azure Dolphin*, 371 N.C. at 601, 821 S.E.2d at 726. Our Supreme Court disagreed and held the allegations did not create a fiduciary relationship between the parties. *Id.* at 601-02, 821 S.E.2d at 726-27. Here, Defendants have not shown how their purported reliance on Plaintiff created a "confidence reposed on one side, and the resulting superiority and influence on the other, necessary to show the existence of a fiduciary relationship as a matter of fact." *Id.* at 601-02, 821 S.E.2d at 726-27. Defendant initiated the negotiations by soliciting Plaintiff's involvement and averred Plaintiff was "negotiating for" Huckabee. The trial court did not err in granting summary judgment for Plaintiff on Defendants' claims for constructive fraud and for breach of a fiduciary duty. Defendants' arguments are overruled.

V. Defendants' Appeal: Motion to Amend

¶ 56 **[3]** Defendants further argue the trial court abused its discretion and erred by denying their motion to amend their counterclaims. Defendants sought to amend their counterclaims and file new claims for actual fraud, slander to title, malicious prosecution, and tortious interference with contract. These allegations are based upon a premise of actual fraud.

A. Standard of Review

¶ 57 "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Once the pleadings are joined "[a] motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *see* N.C. Gen. Stat. § 1A-1, Rule 15 (2019).

B. Analysis

¶ 58 The trial court denied Defendants' motion to amend their pleadings because such amendment would be futile. "To successfully assert an allegation of actual fraud, the plaintiff must plead five elements: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 9, 812 S.E.2d 831, 837 (2018) (citations and internal quotation marks omitted).

¶ 59 "[A]ny reliance on the allegedly false representations must be reasonable." *Id.* (citations omitted). Rule 9 of our Rules of Civil Procedure place an increased burden on the pleader requiring "the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b). Defendants failed to assert a sufficient allegation and showing in their pleadings, depositions, and affidavits of any reasonable reliance upon false representations by Plaintiff to constitute actual fraud to overcome Plaintiff's motion for summary judgment. Defendants failed to show any abuse of discretion in the trial court's denial of Defendants' motion to amend their pleadings, where such amendment would be futile. Defendants' arguments are overruled.

VI. Conclusion

¶ 60 Viewed in the light most favorable to Plaintiff and Defendants on their respective motions for summary judgment and giving both parties the benefit of any disputed inferences of their respective claims, the trial court properly entered summary judgment on all claims. The trial court did not err, much less abuse its discretion, in denying Defendants' motions to amend their counterclaims. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges COLLINS and CARPENTER concur.

STATE v. GARRETT

[277 N.C. App. 493, 2021-NCCOA-214]

STATE OF NORTH CAROLINA
v.
CHARISSE L. GARRETT, DEFENDANT

No. COA20-326

Filed 18 May 2021

1. Indictment and Information—indictment—charges involving fentanyl—statutory basis—prior version of statute

Defendant's indictment for trafficking and possession of fentanyl was facially valid because, although the version of the charging statute—N.C.G.S. § 90-95(h)(4)—that was in effect at the time of the offenses did not mention fentanyl by name, fentanyl qualified as an "opiate" within the meaning of the statute. The legislature's subsequent amendment to replace "opium or opiate" with "opium, opiate, or opioid" was a clarification and not a substantive change.

2. Jury—deadlocked jury—instructions—no plain error

In a drug prosecution, where the jury sent a note to the trial court on the second day of deliberations that the jurors could not agree on any of the seven charges, the trial court's instructions for the jury to continue its deliberations in an effort to reach a unanimous decision did not constitute plain error. The instructions included the main ideas contained in N.C.G.S. § 15A-1235(b), if not its language verbatim.

Appeal by Defendant from judgment entered on 12 December 2019 by Judge William A. Wood II in Pasquotank County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Richard Croutharmel for the Defendant.

JACKSON, Judge.

¶ 1 The issues in this case are (1) whether a portion of Defendant's indictment was defective for alleging possession of a controlled substance that was not covered under the statute; and (2) whether the trial court improperly influenced a deadlocked jury. We conclude that the trial court committed no error.

I. Factual and Procedural Background

¶ 2 The evidence presented at trial tended to show the following. On 31 December 2016, Charisse L. Garrett ("Defendant") was driving from New York to North Carolina when she was pulled over for a traffic violation on Highway 17 in Pasquotank County. Trooper B. Davis of the North Carolina State Highway Patrol had observed Defendant's vehicle swaying back and forth and failing to maintain proper lane control. As Trooper Davis was speaking with Defendant on the side of the roadway, two other agents from the North Carolina State Bureau of Investigation ("SBI") arrived on the scene.

¶ 3 Defendant stepped out of the vehicle, and SBI Officer J. Godfrey used his K-9 narcotics dog to conduct a perimeter search around the exterior of the vehicle. The dog alerted on the driver door and rear of the vehicle. Officers subsequently searched the vehicle, and found in the rear passenger area a shopping bag containing a packet of baby wipes. Inside the packet of baby wipes, officers found a small taped-up package. The package contained a tan powder and a tan hard substance that officers believed to be controlled substances. When asked about the substance, Defendant denied knowledge of it, informing officers that her cousin had handed her the shopping bag in New York and asked her to carry it to a friend in Edenton, North Carolina. Officer K. Johnson of the North Carolina Alcohol Law Enforcement Agency took the substance to the local sheriff's office, weighed it, photographed it, and bagged it. He then personally delivered it to the nearest state crime lab for analysis.

¶ 4 Defendant was arrested and subsequently charged with trafficking heroin by possession, trafficking heroin by transportation, and maintaining a vehicle for keeping or selling controlled substances. On 29 January 2018, Defendant was indicted by a grand jury in Pasquotank County on charges of trafficking heroin by possession, trafficking heroin by transportation, maintaining a vehicle for keeping or selling controlled substances, trafficking Fentanyl by possession, trafficking Fentanyl by transportation, possession with intent to sell or deliver heroin, and possession with intent to sell or deliver Fentanyl.

¶ 5 On 5 December 2019, Defendant filed a motion to suppress the evidence gathered from the search of her vehicle, arguing that the traffic stop was unsupported by reasonable suspicion. A hearing was conducted on the motion to suppress on 9 December 2019 in Pasquotank County Superior Court. The trial court held that the traffic stop was constitutional and denied Defendant's motion to suppress in an order dated 10 December 2019.

¶ 6 Defendant's trial began on 10 December 2019. During trial, expert testimony was presented by SBI forensic scientist J. Weathers, who had conducted a chemical analysis of the items found in Defendant's car. Ms. Weathers identified the tan powder as 99.17 grams of Fentanyl (a schedule II controlled substance), and identified the tan hard substance as 20.36 grams of heroin (a schedule I controlled substance). Defendant also testified at trial, stating that she had been on her way to a New Years' Eve party in Edenton, North Carolina when she was pulled over. She said that, prior to leaving New York, her cousin had placed two bags in the rear of her car, with instructions to drop the bags off at a friend's house in Edenton. Defendant testified that she never inspected the bags from her cousin and did not know what they contained.

¶ 7 The defense rested and the trial court denied Defendant's motion to dismiss. During the charge conference, Defendant made no objections to any proposed jury instructions. After the jury charge, the jury deliberated for several hours without reaching a verdict, and were sent home for the evening. The next morning, after the jury deliberated for another hour and 15 minutes, the jury foreperson sent out a note stating that the jury was "undecided on all seven charges." The trial court brought the jury back in and provided an instruction to the jurors regarding their duties to render a verdict. The jury ultimately found Defendant guilty of trafficking heroin by possession, trafficking Fentanyl by possession, possession with intent to sell or deliver heroin, and possession with intent to sell or deliver Fentanyl. The jury found Defendant not guilty on the remaining charges.

¶ 8 The trial court consolidated the charges of trafficking heroin by possession, possession with intent to sell or deliver heroin, and possession with intent to sell or deliver Fentanyl and sentenced defendant at Class E, Prior Record Level II to 90 months minimum and 120 months maximum in prison. On the conviction for trafficking Fentanyl by possession, the trial court sentenced defendant at Class C, Prior Record Level II to 225 months minimum and 282 months maximum in prison and ordered that sentence to run concurrent to the other sentence. Defendant gave oral notice of appeal in open court.

II. Analysis

¶ 9 Defendant raises two arguments on appeal, contending that (1) her indictment for trafficking Fentanyl by possession and possession of Fentanyl with intent to sell or deliver was fatally defective because Fentanyl was not covered by the statute under which she was charged; and (2) the trial court's jury instructions improperly pressured the jury to

reach a unanimous verdict when the jury was deadlocked. We conclude that there was no error in either the indictment or the jury instructions.

A. Indictment

¶ 10 **[1]** "It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (internals marks and citation omitted). Moreover, "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001) (citation omitted). "The sufficiency of an indictment is a question of law reviewed *de novo*." *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019). Here, although Defendant did not challenge the validity of her indictment before the trial court, she now raises a challenge to the facial validity of the indictment. We accordingly conduct a *de novo* review.

¶ 11 Our General Statutes provide as follows with regard to indictments:

> A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2019).

¶ 12 As the statute notes, the "purpose of an indictment is to give a defendant notice of the crime for which he is being charged;" in order to "enable him to prepare his defense" against the charges. *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000) (internal marks and citation omitted). In order to be facially valid, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). "When a defendant has been charged with possession of a controlled substance, the identity of the controlled substance that [the] defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment." *State v. Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605 (2006).

¶ 13 Defendant here argues that her indictment was facially defective because it alleged that she unlawfully possessed and trafficked

Fentanyl—however, at the time that Defendant was arrested, Fentanyl was not mentioned in the statute under which she was charged. We find Defendant's argument unavailing, because even though Fentanyl was not mentioned by name in the statute, we conclude that the statutory text is broad enough to encompass Fentanyl.

¶ 14 Defendant was charged under N.C. Gen. Stat. § 90-95(h)(4), which (at the time of the offense in December 2016) made it unlawful to possess or transport "four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except ampomorphine, nalbuphine, analoxone naltrexone and their respective salts), including heroin, or any mixture containing such substance." N.C. Gen. Stat. § 90-95(h)(4) (2016).

¶ 15 Here, Defendant's indictment listed the offense date as 31 December 2016 and listed the crime committed as "trafficking opium or heroin . . . in violation of N.C.G.S. § 90-95(h)(4)." The indictment then read as follows:

> I. The jurors for the State upon their oath present that on or about the date shown above and in the county named above, the defendant unlawfully, willfully and feloniously did transport 28 grams or more of Fentanyl.
>
> II. The jurors for the State upon their oath present that on or about the date shown above and in the county named above, the defendant unlawfully, willfully and feloniously did possess 28 grams or more of Fentanyl.

¶ 16 The issue is that while the indictment accuses Defendant of possessing and transporting Fentanyl, the statute under which she was charged does not specifically mention Fentanyl as one of the prohibited substances. The question before us thus becomes whether Fentanyl is covered by the more general language of the statute—i.e., whether Fentanyl qualifies as an "opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate" within the meaning of the statute as it was written in 2016. N.C. Gen. Stat. § 90-95(h)(4) (2016). We hold that Fentanyl does indeed qualify as an opiate within the meaning of the statute.

¶ 17 We begin our analysis with a general explanation of the differences between opium, opioids, and opiates. "Opium" is a natural substance

extracted from the unripe seed pods of the opium poppy, *papaver somniferum*.[1] "Opiates" are typically defined as natural analgesic drugs derived from opium, including "natural opioids such as heroin, morphine, and codeine," which bind to certain receptors in the central nervous system to reduce the intensity of pain signals, induce sedation, calmness, or euphoria.[2] In contrast, synthetic opioids are a category of drugs that are either partially or wholly synthetic, produced in a lab in order to mimic the effects of opium.[3] Fentanyl is usually considered to be a synthetic opioid, as it is wholly manmade with no natural components.[4] Finally, "opioid" is most commonly used as an umbrella term to refer to "all natural, semisynthetic, and synthetic opioids."[5]

¶ 18 However, these definitions are not universal—as noted by the State, there is significant variation and overlap in the definitions of the term "opiate" and "opioid," and different sources define these terms with varying levels of specificity. The State contends that the legislature in-

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1. *Opium*, Encyclopedia Britannica (2021) ("Opium, narcotic drug that is obtained from the unripe seedpods of the opium poppy (*papaver somniferum*), a plant of the family Papaveraceae.").

2. *Opium*, Encyclopedia Britannica (2021) ("Opium and the drugs obtained from it are called opiates."); *Commonly Used Terms*, Opioid Overdose, Centers for Disease Control and Prevention, 26 January 2021, https://www.cdc.gov/drugoverdose/opioids/terms.html ("Opiates refer to natural opioids such as heroin, morphine and codeine."); *Opiate*, Merriam-Webster Dictionary (2021).

3. *What are synthetic opioids like fentanyl?*, Drug Policy Alliance, https://drugpolicy.org/what-are-synthetic-opioids-fentanyl. ("Synthetic opioids refer to a category of novel psychoactive substances (NPS) that are either known to be opiates or have opiate-like effects. These are not naturally occurring substances, although they have effects related to the naturally occurring drugs from several species of the opium poppy plant."); Destiny Bezrutczyk & Theresa Parisi, *What are Synthetic Opioids?*, The Addiction Center, 29 March 2021, https://www.addictioncenter.com/opiates/synthetic-opioids/ ("Synthetic opioids are a class of drug that are manufactured in laboratories and designed to have a chemical structure which is similar to opiates naturally derived from the opium poppy.").

4. *Glossary of Terms*, Johns Hopkins Medicine, 12 February 2018, https://www.hopkinsmedicine.org/news/articles/glossary-of-terms ("Fentanyl: A fully synthetic opioid, 100 times more powerful than morphine."); *State v. Locklear*, 261 N.C. App. 309, 817 S.E.2d 799, 2018 WL 4201067, at *2 (2018) (unpublished) (describing "fentanyl" as "a synthetic opioid").

5. *Commonly Used Terms*, Opioid Overdose, Centers for Disease Control and Prevention, 26 January 2021, https://www.cdc.gov/drugoverdose/opioids/terms.html ("Opioids refer to all natural, semisynthetic, and synthetic opioids."); Leah Miller, Sarah Hardey, & Ryan Kelley, *Opiates vs Opioids: What's the Difference?*, American Addiction Centers, 30 March 2021, https://americanaddictioncenters.org/opiates ("Opioid is an umbrella term that includes natural opioids, semi-synthetic opioids derived from natural opioids, and synthetic opioids created in a laboratory.").

tended for "opiate" to encompass any drug that produces an opium-like effect by binding to opiate receptors in the brain—which would include both drugs naturally derived from opium (such as morphine) as well as synthetic and semi-synthetic drugs (such as Fentanyl). On this point we agree with the State that the legislature intended for this broader definition of "opiate" to apply to § 90-95(h)(4), and that Fentanyl accordingly qualifies as an opiate.

¶ 19 First, we note that this broader definition of "opiate" is supported by the common dictionary definition of the term. *See Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013) ("In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.") (citation omitted). The entry for "opiate" in the Merriam-Webster Dictionary provides as follows:

> A. an alkaloid drug (such as morphine or codeine) that contains or is derived from opium, binds to cell receptors primarily in the central nervous system and gastrointestinal tract, acts to block pain, induce sedation or sleep, depress respiration, and produce calmness or euphoria, and is associated with physiological tolerance, physical and psychological dependence, and addiction upon repeated or prolonged use.
>
> B. a synthetic or semisynthetic drug (*such as fentanyl* or methadone) or an endogenous substance (such as beta-endorphin) that binds to opiate cell receptors and produces physiological effects like those of opium derivatives: [see also] OPIOID sense 1

Opiate, Merriam-Webster Dictionary (2021) (emphasis added).

¶ 20 In addition to the being consistent with the dictionary definition, this broader definition of "opiate" is also supported by the statutory definition of "opiate" found within Chapter 90. *See State v. Boykin*, 853 S.E.2d 781, 785 (N.C. Ct. App. 2020) ("Where . . . the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.") (internal marks and citation omitted). At the time of the offense in December 2016, the definitions portion of Article 5, Chapter 90 (the North Carolina Controlled Substances Act) defined an "opiate" as "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability." N.C. Gen. Stat. § 90-87(18) (2016). We hold that Fentanyl falls within this definition. It

is a highly addictive substance that produces effects that are similar to those of morphine by acting on the opiate cell receptors in the brain.

¶ 21 Finally, Defendant argues that her proposed definition of an "opiate"—i.e., as only those substances naturally derived from the opium plant—is supported by the subsequent legislative history of the statute. She points out that § 90-95(h)(4) was amended in 2018 (two years after Defendant's indictment) to specifically add "opioids" as one of the prohibited substances under the statute. *See* S.L. 2018-44 § 7 (removing "opium or opiate" and replacing this language with "opium, opiate, or opioid"). Defendant maintains that if there truly were no difference between opioids and opiates, then there would have been no need for the legislature to amend this statute just to add the word "opioid."

¶ 22 We disagree. A subsequent amendment to a statute can indicate "that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) (citation omitted). "When the legislature amends an ambiguous statute, the presumption is not that its intent was to change the original act, but merely to clarify that which was previously doubtful." *Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 95, 357 S.E.2d 686, 689 (1987) (internal marks and citation omitted). "Even the action of the legislature in amending a statute so as to make it directly applicable to a particular case is not a conclusive admission that it did not originally cover such a case." *Childers*, 274 N.C. at 260, 162 S.E.2d at 484 (internal marks and citation omitted).

¶ 23 Here, the meaning of the term "opiate" as used in § 90-95(h)(4) in 2016 was ambiguous, as it was susceptible to more than one reasonable interpretation. In 2018, the General Assembly responded to the significant level of variation and overlap in the definitions of the term "opiate" and "opioid" by enacting Session Law 2018-44 to clarify that opium, opiates, and opioids were all prohibited substances. Accordingly, we hold that the legislature's amendment of § 90-95(h)(4) was intended to clarify rather than alter the meaning of this term, and to clarify the scope of the substances covered by the statute.

¶ 24 In conclusion, because Fentanyl qualified as an opiate under N.C. Gen. Stat. § 90-95(h)(4), it was illegal to possess or traffic in Fentanyl under this statute at the time of the offense in 2016. Defendant was thus properly charged and convicted for trafficking and possession of Fentanyl under this statute, and her indictment was not defective.

B. Jury Instructions

¶ 25 **[2]** Defendant next argues that the trial court committed plain error in instructing the deadlocked jury. We disagree.

¶ 26 When a defendant fails to object to a jury instruction at trial (as Defendant did here), this Court conducts plain error review. *See* N.C. R. App. P. 10(a)(4); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal marks and citations omitted).

¶ 27 Here, Defendant challenges the instructions provided by the trial court to the jury on the second day of deliberations. After approximately six and a half hours of deliberations that continued into a second day, the jury foreperson sent a note to the trial court. The note stated that "We the jury of the State of NC vs Charisse L. Garrett . . . are not in agreement with guilty or not guilty. Verdict – undecided on all seven charges." The trial court then brought the jury back into the courtroom in order to remind them "what their duties are as jurors and their obligations and send them back out." The trial court instructed the jury as follows:

> In response to this letter, I would like you to listen to the following. Ladies and gentlemen, I have received a note that indicates you're unable to reach a verdict. I know what we are asking you to do is difficult, asking 12 people that do not know each other for the most part to reach a unanimous verdict on [a] matter of this importance. It's not easy.
>
> I would like to remind you that when you were selected to be on the jury these attorneys carefully considered your qualifications. After doing so, they decided that the 12 of you were the best suited to hear

> this case and render a verdict reflecting the truth. I want to remind you that it is your duty to do whatever you can without surrendering an honest conviction as to the effect or weight of the evidence to reach a unanimous decision. You should reason this over as reasonable men and women and do everything possible to reconcile your differences. In getting back to work, no juror should change his verdict simply to reach a verdict, however, do not hesitate to re-examine your own views and change your opinion, if you become convinced it is erroneous.

¶ 28 Defendant contends that this instruction was improper because it failed to recite the language from N.C. Gen. Stat. § 15A-1235(b) (the statute which describes how a judge should instruct a deadlocked jury). We disagree and hold that the instructions were proper because they communicated all of the core ideas contained in the statute and did not contain any misstatements of law.

¶ 29 When a trial court instructs a jury regarding their inability to reach a verdict, "a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgments to the views of the majority is erroneous." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978). In order to aid trial courts in instructing undecided juries, the legislature enacted N.C. Gen. Stat. § 15A-1235(b), which is "now the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *State v. Easterling*, 300 N.C. 594, 608, 268 S.E.2d 800, 809 (1980). The statute provides as follows:

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

N.C. Gen. Stat. § 15A-1235(b) (2019).

¶ 30 Our Supreme Court has previously upheld a trial court's instructions under this statute when "the trial court's instructions addressed all of the concerns set out in [the statute]," even though the trial court did not recite the statutory language verbatim. *State v. Aikens*, 342 N.C. 567, 579, 467 S.E.2d 99, 107 (1996). *See also State v. Peek*, 313 N.C. 266, 272, 328 S.E.2d 249, 253 (1985) (upholding trial court's instructions to an undecided jury because "the essence of the instructions" was correct, "although the instructions [did] not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235"); *State v. Lane*, 253 N.C. App. 239, 798 S.E.2d 437, 2017 WL 1381643, at *7 (2017) (unpublished) ("[T]he trial judge is not required to recite instructions verbatim from the statute.").

¶ 31 Here, we likewise conclude that the trial court did not err because it provided the jury with the key essence of the instructions from N.C. Gen. Stat. § 15A-1235(b) after the jury indicated that it was undecided in its deliberations. Below, the language from the statute is compared side-by-side with the corresponding rough-equivalent instructions from the trial court (in italics):

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;	*"I want to remind you that it is your duty to do whatever you can without surrendering an honest conviction as to the effect or weight of the evidence to reach a unanimous decision."*
2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;	*"You should reason this over as reasonable men and women and do everything possible to reconcile your differences."*
3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;	*"However, do not hesitate to re-examine your own views and change your opinion, if you become convinced it is erroneous."*

4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.	*"In getting back to work, no juror should change his verdict simply to reach a verdict."*

¶ 39 We believe this comparison demonstrates that the instructions given by the trial court contained all of the key elements and ideas from § 15A-1235(b), even though the trial court did not follow the statutory language word-for-word. Accordingly, the jury was properly instructed with regard to their duty to deliberate, and Defendant cannot demonstrate plain error.

III. Conclusion

¶ 40 Defendant has not demonstrated any error in the indictment or the jury instructions.

NO ERROR.

Judges ZACHARY and WOOD concur.

STATE OF NORTH CAROLINA
v.
WILLIE PEARL MACK, JR.

No. COA20-241

Filed 18 May 2021

1. Evidence—other crimes, wrongs, or acts—identification of defendant as perpetrator—identity not in issue—plain error analysis

In a prosecution for second-degree rape and sexual assault, even if the trial court's admission of testimony about a prior rape allegedly committed by defendant was erroneous—since the prior rape was admitted for the purpose of proving defendant's identity as the perpetrator of the current offenses, even though defendant's identity was not necessarily in issue—there was no plain error where the jury probably would not have reached a different verdict in light of the victim's testimony and the DNA test results from the victim's rape kit.

2. Sexual Offenders—registration—reportable offense—sexually violent offenses—statutes recodified—prior versions still applicable

The trial court did not err by requiring defendant to register as a sex offender on the basis that the offenses for which he was convicted—second-degree rape and second-degree sexual offense—were sexually violent offenses which qualified as reportable convictions pursuant to N.C.G.S. § 14-208.7(a). Although defendant's convictions were obtained pursuant to statutes that have since been repealed and recodified and which were removed from the list of offenses that are deemed "sexually violent" (contained in N.C.G.S. § 14-208.6(5)), the plain language of the recodification act states that the former statutes remained applicable for offenses committed prior to the act's effective date, including the offenses at issue here.

3. Satellite-Based Monitoring—lifetime—imposed without a hearing

The trial court erred by requiring defendant to enroll in satellite-based monitoring (for convictions of second-degree rape and second-degree sexual offense) without holding a hearing on the issue, as required by N.C.G.S. § 14-208.40A.

STATE v. MACK

[277 N.C. App. 505, 2021-NCCOA-215]

Appeal by Defendant from Judgments and Orders entered 5 August 2019 by Judge Jeffery K. Carpenter in Cumberland County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Willie Pearl Mack, Jr. (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Second-Degree Rape (under former N.C. Gen. Stat. § 14-27.3) and Second-Degree Sexual Offense (under former N.C. Gen. Stat. § 14-27.5). Additionally, Defendant seeks a Writ of Certiorari from this Court to review Orders requiring Defendant to register as a sex offender and to enroll in satellite-based monitoring for the rest of Defendant's life. The Record, including evidence adduced at trial, tends to reflect the following:

¶ 2 Tamara[1], the alleged victim in this case, moved to Fayetteville, North Carolina from Washington, DC in 2011. On the night of 2 August 2011, Tamara was in a park in downtown Fayetteville "doing drugs" with "a couple of homeless people[.]" At some point, Tamara decided to take a walk in order to "score drugs." Tamara admitted to having traded sexual acts for drugs in her past, but had stopped doing so because she was "deathly afraid" of contracting HIV. On the night in question, Tamara had her former boyfriend's food stamp card which she planned to use to "swap for some drugs."

¶ 3 Tamara recalled seeing a man "way back" behind her as she walked and that the man was walking "extremely fast." Tamara noted, "every time I looked back he was just closer and closer. Like I felt like he was running up on me. . . . I stopped just to let him pass me[.]" According to Tamara, "[the man] spoke and I spoke back, . . . I remember him telling me I had a pretty smile . . . I don't remember how the drug conversation came up, but he was like yeah, I know somebody." The man told Tamara, "I can take you to get some, you know, don't worry about it. Just follow

1. We use the parties' stipulated pseudonyms: "Tamara" for the alleged victim in this case; and "Kesha" for another alleged victim of Defendant who testified for the State at trial.

me." Tamara had followed strangers to find drugs before, and she was willing to "take that gamble." However, Tamara denied the man ever requested Tamara exchange sex for drugs.

¶ 4 Tamara followed the man, and the two turned down a street Tamara recognized because she "might have been down there to somebody's house" in order to use drugs. Tamara continued to follow the man around a corner to an open area behind a building. When Tamara rounded the corner with the man, the man "turned on me real quick. . . . [H]e grabbed me by my neck. And I'm not going to say he squeezed me - - the life out of me where I couldn't breathe, but he was squeezing pretty hard. I knew what was getting ready to happen." The man told Tamara if she moved or screamed, "he's going to f[---]ing kill me and he asked me was I going to be a good girl." Tamara "never knew what fear was until that day" and that she "couldn't cry." The only thing she could say was "please don't kill me[.]"

¶ 5 Then, the man started "feeling all over" her. At first, Tamara thought the man might be robbing her, but "everything he took out, he put back." The man forced Tamara's head down and made her perform oral sex on him. Then, the man pulled Tamara's pants down, "got behind" her, and "had sex with [Tamara] from behind until he ejaculated." Tamara also recalled the man "kissed me passionately like we was in a relationship" after the rape. Tamara stated the kiss made her sick to her stomach. The man never gave Tamara any drugs and Tamara had never promised to exchange sex for drugs. After the rape, the man ran away. Tamara then ran "over to the Burger King" nearby where people told her there were police officers present. Tamara did so because she "knew he messed up when he ejaculated in me and it was no way I was going to let that get out of me."

¶ 6 After midnight on 2 August 2011, Officer Zaira Scott, with the Fayetteville Police Department, was at a Burger King restaurant in downtown Fayetteville with Officer Scott's training officer discussing a call to which the two had just responded. As Officer Scott and the training officer were talking, a woman approached the officers' vehicle and told the officers she had just been "sexually assaulted." The woman, Tamara, was "[u]pset," "angry," and "crying[.]" Tamara told Officer Scott that a man had been following her as Tamara walked down Person Street in downtown Fayetteville. Tamara told the officers the man "forced" her to walk behind a building and "choked her by putting his hand around [her] neck." According to Tamara, the man threatened to kill her if she did not do "what he told her to do." Tamara described her assailant as a bald man with "a little thin mustache."

¶ 7 Tamara recounted the assault to the officers stating: "the black male pulled her pants down and penetrated her vagina with his penis." After Tamara recounted the alleged assault to the officers, the officers searched her and "put her in the back of [the] patrol car[.]" The officers found no illegal contraband on Tamara. The officers took Tamara to the alleged crime scene where the officers collected a Pepsi bottle from which Tamara claimed her assailant had been drinking. The officers then took Tamara to Cape Fear Valley Hospital for "medical assistance," and she "agreed to do [a] sexual assault kit."

¶ 8 After reviewing a report of the incident, Detective John Benazzi, who was at the time with the Fayetteville Police Department's Special Victims Unit, contacted Tamara in order to investigate the alleged rape. According to Detective Benazzi, Tamara "reiterated exactly what she told" the two officers on the night of the incident. Tamara told Detective Benazzi her assailant was a "black male about 40 years old, bald head . . . and a mustache." Detective Benazzi did not find a person matching that description when he searched a nearby bus station. Detective Benazzi assembled a "photo array" of potential suspects based on Tamara's description of her alleged assailant. Tamara "did not make an identification with anybody in that photo lineup." When Detective Benazzi spoke with Tamara after the photo lineup, Tamara "was still very scared" and did not want to stay in Fayetteville any longer. The Fayetteville Police victim advocate obtained a bus ticket for Tamara so she could go to Winston-Salem. Eventually, Fayetteville Police "inactivated" Tamara's case as "there were no further leads to follow up on[.]"

¶ 9 Several years later, in 2015, the Fayetteville Police Department received a federal grant to investigate the Department's "backlog" of untested sexual assault kits. Fayetteville Police sent Tamara's sexual assault kit to the Federal Bureau of Investigation (FBI) for testing in December 2016. The FBI's testing returned a potential match to a "Willie Mack" already in the national database. Based on this potential match, Detective Benazzi "started trying to reach out to [Tamara]." Detective Benazzi was able to find Tamara when Tamara appeared for a court date in Forsyth County in December 2017. When Detective Benazzi showed Tamara a picture of Defendant, Tamara stated: "Wow. Wow. That's the man who raped me."

¶ 10 Detective Benazzi obtained a search warrant to collect DNA evidence, in the form of buccal swabs, from Defendant. The FBI's comparison of the DNA from Defendant's buccal swabs indicated a match with the male DNA from Tamara's sexual assault kit. Detective Benazzi interviewed Defendant as he was executing the search warrant to

obtain Defendant's buccal swabs. During the interview, which Detective Benazzi recorded, Defendant said he was in Oklahoma during 2011.[2]

¶ 11 A Cumberland County Grand Jury Indicted Defendant on charges of Second-Degree Rape, First-Degree Kidnapping, and Second-Degree Sexual Offense involving the alleged victim Tamara on 11 February 2019. The Grand Jury also indicted Defendant for attaining Habitual-Felon-Status. Defendant's case came on for trial in Cumberland County Superior Court on 29 July 2019.

¶ 12 During her trial testimony, Tamara, pointed to Defendant in open court identifying him as her assailant. She described Defendant as a "[b]lack male, bald, thin mustache." On cross examination, Defendant's counsel asked Tamara: "Now, you were pretty pissed about the situation when there weren't any drugs involved; weren't you?" Tamara responded: "I was pretty pissed at the fact that I thought this was going to be an easy transaction and not a rape."

¶ 13 Jade Gray, a supervisory biologist forensic examiner in the DNA casework unit at the FBI laboratory, testified for the State. After the trial court accepted Gray as a DNA expert, Gray testified her lab received evidence in the State's case against Defendant in December of 2016. Gray's team tested vaginal swabs from Tamara's sexual assault kit, oral swabs from Defendant, and another sample from Tamara. The test of the vaginal swabs revealed "male and female DNA" and the DNA "unlike [Tamara's] was consistent of having arisen from a single male individual[.]" Gray "selected [the male DNA] to be uploaded" into the Combined DNA Index System (CODIS) to see if the male DNA profile matched any profiles already in the database. Gray testified the male DNA tested and uploaded came back as a match in the database to a Willie Pearl Mack. On 29 June 2017, Gray sent a letter to Lieutenant Somerindyke, with the Fayetteville Police Department, informing him that the male DNA returned a CODIS match to a Willie Pearl Mack.

¶ 14 According to Gray, after testing the buccal swabs Detective Benazzi obtained from Defendant, the comparison between the male DNA profile from Tamara's sexual assault kit and the profile from Defendant's buccal swabs revealed that the male DNA from the sexual assault kit was "660 sextillion times more likely" to have come from Defendant than from another contributor. This likelihood "fell into [Gray's lab's] highest level of support for identification."

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2. The State played the recording of Detective Benazzi's interview with Defendant for the jury during direct examination of Detective Benazzi.

¶ 15 Prior to trial, the State had indicated its intent to introduce evidence of Defendant's prior bad acts—including evidence of other rapes committed by Defendant—pursuant to Rule 404(b) of the North Carolina Rules of Evidence. In response, Defendant filed a Motion in Limine seeking exclusion of such evidence. After other witnesses testified, the trial court heard—outside the presence of the jury—both parties on the issue of evidence of Defendant's prior alleged rapes. The State only had witnesses present who could testify about one of the alleged rapes involving a woman named Kesha. The trial court heard voir dire testimony from Kesha about a 2009 encounter with Defendant where Kesha alleged Defendant raped her. Kesha testified she lived in Fayetteville and, on the morning of 29 July 2009, she was supposed to be at court in downtown Fayetteville by 9 a.m. as a witness. Kesha further stated, after she missed the bus she planned to take to court, she tried to find "a ride" to get to court. Kesha said she needed a light for her cigarette and was planning to offer someone "a couple dollars" to give her ride to court. According to Kesha, a man in a burgundy "F150" stopped. Kesha "asked him for a light" and if she could give him the money to take her to the courthouse. When Kesha got into the truck, the man pointed a gun at her and told her he would "either blow [her] brains off or kill [her]" if Kesha was not quiet. Kesha testified the man took her to a secluded area and forced her to have oral and vaginal intercourse several times. After the man had finished, Kesha stated she got out of the truck and sought help.

¶ 16 After voir dire, the trial court stated: "the [S]tate has indicated its intent to tender this evidence for the purpose of showing a plan, identity and/or modus operandi[.]" The trial court found "as a matter of law that the evidence is relevant." The trial court further found:

> The similarities between the cases the Court finds are as follows. Both the alleged victims were African-American females. They were both in Fayetteville . . . In both cases, there was the occurrence of vaginal and oral – forced vaginal and oral sex. Both victims were on foot at the time of the assault. Both victims were moved to secluded areas for facilitation of the assaults. There was a threat to kill both victims and the alleged assailant, as to both cases, was a stranger to the victim in each case.

The trial court concluded, as a matter of law, the evidence was not admissible under Rule 404(b) to show common plan, scheme, or modus operandi. However, the trial court found that "identity is an issue." The trial court found that Defendant stated to investigators in Tamara's case

that he "was not in Fayetteville in 2011." The trial court further found, as to identity, there was "a substantial similarity in the two cases . . . as both victims in each case identified the assailant as a black male, bald headed with a mustache." The trial court concluded it would allow the evidence of Kesha's alleged rape for the purpose of proving the identity of the assailant in Tamara's case and give the jury a limiting instruction on that evidence. Defense counsel objected to the trial court's rulings.

¶ 17 The State called Kesha to testify before the jury. Kesha testified that, on the morning of 29 July 2009, she was supposed to be a witness in court. Kesha said she needed a ride to the courthouse because she had missed the bus she was going to take to the courthouse. Kesha stated as she was walking to the courthouse shortly after 8 a.m., "[a]n individual in a red truck stopped me and I asked for a light to my cigarette. Then I asked him could I get a ride to downtown to get to court because I didn't want to be late." Kesha said the man in the red truck offered to light her cigarette and that she offered the man "a few dollars" in gas money if he would give her a ride to court.

¶ 18 The man driving the truck agreed to take Kesha to court. Kesha described the man as "a Black male. He has a bald head and wears a mustache." Kesha testified, as she got in the truck and tried to put on her seatbelt, the man "pulled [a gun] on [her]." Kesha said the man told her if she did not cooperate, the man would "blow my head off or kill me[.]" According to Kesha, the man took her down a secluded dirt road into a wooded area. Kesha stated the man: "pulled out his penis. He stuck it in my vagina, took it out my vagina, put it in my mouth, put it back in my vagina and put it back in my mouth and ejaculated." Kesha said she did not consent to the sexual acts and that the man had not promised anything to Kesha in exchange for the sexual acts. Kesha testified she remembered: the truck was a "red or burgundy" F-150; there were blankets and a bottle of baby oil in the truck; and there was a woman's identification tag hanging on the rearview mirror and Kesha recounted the name on the tag. Then Kesha got out of the truck and used a stranger's phone to call the police. The Record indicates defense counsel did not object to Kesha's testimony when it was introduced at trial.

¶ 19 After the close of the State's case-in-chief, Defendant did not offer any evidence in his defense. The trial court included in its jury instructions that the evidence of Kesha's rape could only be considered for the purpose of proving Defendant's identity in Tamara's rape, if the jury believed the evidence. The jury found Defendant guilty of the Second-Degree Rape and Second-Degree Sexual Offense charges but

acquitted Defendant on the First-Degree Kidnapping charge. The State elected not to proceed on the Habitual Felon Indictment.

¶ 20 During sentencing, the trial court asked the State: "What's your position in regards to whether or not [Defendant's prior Attempted First-Degree Rape conviction] makes him a recidivist for the purpose of sentencing in this case?" The State responded: "Yes, Your Honor. So I looked up the statute and the statute, specifically as it relates to that offense, just lists out -- it doesn't specify the dates of offense." The trial court sentenced Defendant to an active term of 146 to 185 months in prison on the Second-Degree Rape charge and found that "second-degree rape is a reportable offense as that term is defined in 14-208.6." The trial court also sentenced Defendant to an active term of 148 to 185 months on the Second-Degree Sexual Offense charge, to run consecutively with the Second-Degree Rape sentence. The trial court then stated:

> In regards to AOC CR 615, show the Defendant has been convicted of a sexually violent offense. That's under 1(B), that the Defendant has not been classified as a sexually violent predator. The Defendant is a recidivist, paragraph three. The offense is an aggravated offense, paragraph four. The offense did not involve the physical, mental, or sexual abuse of a minor. The Defendant will be required to register as a sex offender for the rest of his natural life, the Court determines as a condition of the statute.

¶ 21 The trial court continued: "In regards to satellite-based monitoring, that requires a separate hearing, Madam D.A." The State responded: "Yes, Your Honor." When the trial court asked if the State wanted to "deal with that now[,]" the State declined stating, "they can deal with it at a separate hearing." Defendant gave oral Notice of Appeal in open court. The same day, the trial court entered written Judgments on the Second-Degree Rape and Second-Degree Sexual Offense convictions. The trial court also entered two separate Judicial Findings and Order for Sex Offenders—one for each conviction—requiring Defendant to register as a sex offender and to enroll in satellite-based monitoring, after Defendant's release from prison, for the remainder of his life (Sex Offender Registration Orders).

Issues

¶ 22 The relevant issues on appeal are whether: (I) the trial court committed plain error by allowing evidence of Defendant's prior bad acts to prove his identity as the perpetrator in the alleged offenses in this

case; and (II) whether the trial court (A) erred in concluding the jury had convicted Defendant of a sexually violent offense—and, thus, a reportable conviction, pursuant to N.C. Gen. Stat. § 14-208.6(5)—and, if not, (B) whether the trial court erred by not holding a hearing regarding satellite-based monitoring pursuant to N.C. Gen. Stat. § 14-208.40A(a).

Analysis

I. Prior Bad Acts

¶ 23 **[1]** Defendant contends the trial court erred in admitting evidence of the prior alleged rape of Kesha for the purpose of proving his identity in this case pursuant to N.C. R. Evid. 404(b). However, despite objecting following the voir dire of the witness, Defendant did not renew his objection to this evidence when the State actually sought to introduce it. Defendant thus concedes our review is limited to whether the trial court's admission of the evidence constituted plain error. *State v. Ray*, 364 N.C. 272, 277-78, 697 S.E.2d 319, 322 (2010). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

¶ 24 "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). North Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that [the person] acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake . . . ." *Id.* "[B]efore evidence of other distinct crimes may be admitted under the [identity] exception, two requirements must be met. First, the identity of the defendant must be an issue in the case." *State v. Thomas*, 310 N.C. 369, 373, 312 S.E.2d 458, 460-61 (1984). "The second prong of the exception . . . requires that the circumstances of the two crimes be such as to tend to show that the crime charged and another offense were committed by the same person." *Id.* (citation and quotation marks omitted).

¶ 25 "In a criminal case, the identity of the perpetrator of the crime charged is always a material fact." *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990) (citation omitted). However, "identity is not always in issue." *State v. White*, 101 N.C. App. 593, 600, 401 S.E.2d 106, 110 (1991) (citing *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12

(1986)). Evidence of prior bad acts is admissible to prove identity "where the accused is not definitely identified." *State v. Williams*, 82 N.C. App. 281, 284, 346 S.E.2d 315, 316 (1986) (citation omitted). "[U]nless the defendant presents alibi evidence, evidence of other crimes to show identity, either directly or indirectly (common plan), should not be admitted[.]" *Id.* (quoting *State v. Streath*, 73 N.C. App. 546, 550, 327 S.E.2d 240, 242, *disc. rev. denied*, 313 N.C. 513, 329 S.E.2d 402 (1985)).

¶ 26 In this case, while Defendant's identity was a material fact, it was not necessarily in issue. Defendant presented no evidence in his own defense, and did not claim an alibi at trial. The only evidence possibly giving rise to an alibi defense was a recording of an interview introduced by the State in which Defendant initially claimed he was out-of-state for the entire year of 2011. Here, however, evidence of the rape of Kesha occurring in 2009 is, at best, tangential to proving Defendant was, in fact, in North Carolina approximately two years later at the time of the rape in this case. Moreover, the circumstances of the two rapes, separated in time by approximately two years, while both horrific, are not so particularly similar as to necessarily constitute proof that the same individual committed both using a similar modus operandi. *See State v. Corum*, 176 N.C. App. 150, 156-57, 625 S.E.2d 889, 893 (2006) ("[T]here must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." (citation and quotation marks omitted)).

¶ 27 Presuming, without deciding, however, that the admission of this 404(b) evidence constituted error, the second prong of our plain error analysis requires us to determine if, absent this error, the jury probably would have reached a different result. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. In light of the overwhelming evidence of Defendant's identity and guilt presented in this case, Defendant has not shown the jury would have reached a different result.

¶ 28 The State presented DNA evidence showing 660 sextillion-to-one that Defendant's, and not someone else's, DNA was in Tamara's sexual assault kit. Defendant does not challenge this evidence on appeal. Further, Tamara affirmatively identified Defendant as her assailant and gave detailed testimony of the incident with Defendant. Tamara testified Defendant choked her and threatened to kill her if she did not acquiesce to his demand for intercourse. On cross examination, Tamara did not waver when asked if Defendant might have offered her something in exchange for sex—insinuating the encounter was consensual. In fact, she repeatedly stated she only followed Defendant because he said he knew where to find drugs. In light of this evidence, the jury would prob-

ably not have reached a different verdict absent the evidence of the prior rape. *See State v. Walker*, 316 N.C. 33, 40, 340 S.E.2d 80, 84 (1986) ("[T]he overwhelming evidence against the defendant prevented the error complained of from rising to the level of 'plain error[.]' "). Consequently, the trial court did not commit plain error by admitting evidence of the prior alleged rape.

II. Reportable Offenses and Satellite-Based Monitoring

¶ 29 Defendant also argues the trial court erred by finding his convictions under former N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 were "sexually violent offenses" pursuant to N.C. Gen. Stat. § 14-208.6(5). As such, according to Defendant, his convictions were not reportable convictions under N.C. Gen. Stat. § 14-208.6(4), and the trial court could not order Defendant to register as a sex offender. Moreover, Defendant argues the trial court did not conduct a separate hearing regarding satellite-based monitoring and, thus, could not order Defendant to enroll in satellite-based monitoring.

¶ 30 As a threshold matter, Defendant did not file written notice of appeal from the trial court's Orders. Rule 3 of our Rules of Appellate Procedure governs notices of appeal from the Sex Offender Registration Orders. *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010). Rule 3 requires parties to file written notice of appeal thirty days after the entry of such a judgment or order. N.C. R. App. P. 3(a), (c) (2021). Therefore, giving oral notice of appeal in open court is "insufficient to confer jurisdiction on this Court." *Brooks*, 204 N.C. App. at 194-95, 693 S.E.2d at 206. Recognizing his trial counsel only gave oral Notice of Appeal from the criminal Judgments and did not file written notice of appeal from the Sex Offender Registration Orders, Defendant has filed a Petition for Writ of Certiorari with this Court to grant review of the Sex Offender Registration Orders.

¶ 31 Rule 21 of our Rules of Appellate Procedure provides: "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (2021); *see also* N.C. Gen. Stat. § 7A-32(c) (2019). In our discretion, we allow Defendant's Petition and review the merits of his arguments. *See State v. Green*, 229 N.C. App. 121, 128, 746 S.E.2d 457, 464 (2013) (granting certiorari where "[d]efendant conceded that although he properly gave oral notice of appeal in open court, he failed to file written notice of appeal" from the trial court's sex offender order).

A. Reportable Convictions

¶ 32 **[2]** Here, the trial court found Defendant had been convicted of sexually violent offenses and, thus, reportable convictions. The trial court also found Defendant was a recidivist and that the offenses were aggravated offenses. Accordingly, the trial court ordered Defendant to register as a sex offender for life. A trial court's statutory interpretation in sex offender registration cases is a question of law we review de novo. *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009) (citations omitted). "In matters of statutory interpretation . . . '[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.' " *Id.* (quoting *State v. Abshire*, 363 N.C. 322, 329-30, 677 S.E.2d 444, 450 (2009)).

¶ 33 "A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a) (2019). A "reportable conviction" is any final conviction: "for an offense against a minor"; for "a sexually violent offense,"; "in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section"; or "in a federal jurisdiction (including court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section." N.C. Gen. Stat. § 14-208.6(4)(a)-(c) (2019).

¶ 34 The trial court found Defendant's convictions for former N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 were sexually violent offenses. In 2015, the General Assembly repealed and recodified both N.C. Gen. Stat. §§ 14-27.3 (second-degree rape) and 14-27.5 (second-degree sexual offense). An Act to Reorganize, Rename, and Renumber Various Sexual Offenses . . . , S.L. 2015-181, 2015 N.C. Sess. Laws 460 (the Act). The General Assembly also changed the definition of "sexually violent offense." N.C. Gen. Stat. § 14-208.6(5) now defines a sexually violent offense as:

> A violation of former G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.21 (first-degree forcible rape), G.S. 14-27.22 (second-degree forcible rape), G.S. 14-27.23 (statutory rape of a child by an adult), G.S. 14-27.24 (first-degree statutory rape), G.S. 14-27.25(a) (statutory rape of a person who is 15 years of age or younger and where the defendant is at least six years older), G.S. 14-27.26 (first-degree

> forcible sexual offense), G.S. 14-27.27 (second-degree forcible sexual offense), G.S. 14-27.28 (statutory sexual offense with a child by an adult), G.S. 14-27.29 (first-degree statutory sexual offense), G.S. 14-27.30(a) (statutory sexual offense with a person who is 15 years of age or younger and where the defendant is at least six years older), G.S. 14-27.31 (sexual activity by a substitute parent or custodian), G.S. 14-27.32 (sexual activity with a student), G.S. 14-27.33 (sexual battery), G.S. 14-43.11 (human trafficking) if (i) the offense is committed against a minor who is less than 18 years of age or (ii) the offense is committed against any person with the intent that they be held in sexual servitude, G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-202.1 (taking indecent liberties with children), G.S. 14-202.3 (Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act), G.S. 14-202.4(a) (taking indecent liberties with a student), G.S. 14-205.2(c) or (d) (patronizing a prostitute who is a minor or has a mental disability), G.S. 14-205.3(b) (promoting prostitution of a minor or a person who has a mental disability), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

N.C. Gen. Stat. § 14-208.6(5) (2019).

¶ 35 Defendant is correct that former N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 are no longer expressly listed as sexually violent offenses under the current version of N.C. Gen. Stat. § 14-208.6(5). For its part, the State

fails to provide any compelling argument to the contrary, instead relying on statutory interpretations of N.C. Gen. Stat. § 14-208.6(5) and related arguments that would result only in a misreading and misapplication of the express statutory language—if not just ignoring it altogether.[3]

¶ 36 Our own analysis, however, reveals the Act that recodified N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 and amended N.C. Gen. Stat. § 14-208.6(5) also included an "effective date" clause stating:

> This act becomes effective December 1, 2015, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, *and the statutes that would be applicable but for this act* remain applicable to those prosecutions.

S.L. 2015-181, § 48, 2015 N.C. Sess. Laws 460, 472 (emphasis added).

¶ 37 Defendant was prosecuted and convicted under the former statutes for acts he committed in 2011, prior to the effective date of the amended N.C. Gen. Stat. § 14-208.6(5). According to the Act's plain language, the prior version of N.C. Gen. Stat. § 14-208.6(5)—in which N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 were listed—which would have applied, *but for* the 2015 amendment, still applies to prosecutions and convictions under those former offenses. Therefore, in this case, Defendant's convictions under N.C. Gen. Stat. §§ 14-27.3 and 14-27.5 were sexually violent offenses and were reportable convictions for the purpose of requiring Defendant to register as a sex offender.[4] *See State v. Dye*, 254 N.C. App. 161, 170 n. 3, 802 S.E.2d 737, 743 n. 3 (2017) ("Sexually violent offense is, in turn,

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3. For instance, the State argues statutory language, permitting a trial court to decide whether an offense committed under the law of another sovereign—i.e. another state or the federal government—is substantially similar so as to qualify as a reportable offense, permits our courts to ignore the exclusive list of North Carolina statutes provided by the General Assembly and simply judicially engraft into the statute other offenses under North Carolina law the General Assembly could have listed, but did not. The State also argues "common sense" allows us to ignore the statutory language and decree Defendant's convictions should be reportable offenses. Finally, the State also speculates had Defendant been charged and tried of crimes that are listed in the current statute, a jury would have convicted Defendant of those offenses, too; and, thus, we should conclude the offenses for which Defendant was, in fact, convicted, should be considered reportable offenses. Each of these arguments is untenable.

4. For reference purposes, the University of North Carolina School of Government has published a flow-chart which assists in identifying crimes which may constitute reportable convictions. Jamie Markham, *Revised Sex Offender Flow Chart (July 2017 Edition)*, https://nccriminallaw.sog.unc.edu/revised-sex-offender-flow-chart-july-2017-edition/ (last visited May 3, 2021).

defined as including, *inter alia*, 'a violation of . . . G.S. 14-27.25(a).' N.C. Gen. Stat. § 14-208.6(5). N.C.G.S. § 14-27.7A, of which Defendant was convicted, was later recodified at N.C. Gen. Stat. § 14-27.25(a) in 2015. *See* 2015 N.C. Sess. Laws ch. 181 § 7(a). Therefore, Defendant's conviction qualified as a reportable conviction."). Consequently, the trial court did not err in ordering Defendant to register as a sex offender.

B. Satellite-Based Monitoring

¶ 38 **[3]** Finally, Defendant argues the trial court could not impose satellite-based monitoring without holding a hearing on the issue. Whether a trial court has properly adhered to the procedures for imposing satellite-based monitoring under N.C. Gen. Stat. § 14-208.40A is a question of law we review de novo. *Davison*, 201 N.C. App. at 357-61, 689 S.E.2d at 513-15.

¶ 39 N.C. Gen. Stat. § 14-208.40A provides:

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney *shall* present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.23 or G.S. 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.
>
> The offender *shall* be allowed to present to the court any evidence that the district attorney's evidence is not correct.
>
> (b) *After receipt of the evidence* from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense

> was a violation of G.S. 14-27.23 or G.S. 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.
>
> (c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.23 or G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life.

N.C. Gen. Stat. § 14-208.40A(a)-(c) (2019) (emphasis added).

¶ 40 Thus, the statute requires the trial court, when considering imposing satellite-based monitoring during the sentencing phase, to conduct a hearing where: the State shall present evidence to the trial court regarding the defendant's eligibility; the defendant *shall* be permitted to rebut that evidence; and, after the trial court receives the evidence, the trial court *shall* determine if the defendant is eligible for monitoring and, if so, shall order the defendant to enroll in such monitoring.

¶ 41 Here, the trial court found—after only eliciting evidence of recidivism from the State and for sentencing purposes:

> In regards to AOC CR 615, show the Defendant has been convicted of a sexually violent offense. That's under 1(B), that the Defendant has not been classified as a sexually violent predator. The Defendant is a recidivist, paragraph three. The offense is an aggravated offense, paragraph four. The offense did not involve the physical, mental, or sexual abuse of a minor. The Defendant will be required to register as a sex offender for the rest of his natural life, the Court determines as a condition of the statute.

However, the trial court acknowledged satellite-based monitoring required "a separate hearing." The State elected to not proceed with that hearing during the sentencing phase stating: "they can deal with [satellite-based monitoring] at a separate hearing."[5] As such, the State

5. Such a hearing would be governed by N.C. Gen. Stat. § 14-208.40B. *See* N.C. Gen. Stat. § 14-208.40B(a)-(c) (2019) ("When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Division of Adult Correction . . . shall make an initial determination" and the trial court of the county where the offender lives shall conduct a hearing as to the offender's eligibility.).

presented no evidence as to Defendant's eligibility regarding monitoring, and Defendant was not afforded the opportunity to present evidence contradicting the State's evidence. Thus, the trial court did not conduct a hearing on the issue, pursuant to N.C. Gen. Stat. § 14-208.40A, and erred by ordering Defendant to enroll in satellite-based monitoring prior to holding the required hearing on the issue. *See State v. Sheridan*, 263 N.C. App. 697, 708, 824 S.E.2d 146, 154 (2019) ("In this case, no evidence was presented prior to or to support the trial court's determination that Defendant would be subject to SBM for the remainder of his life. We vacate the order requiring Defendant to enroll in SBM for the remainder of his life, and remand for proper analysis and determination under N.C. Gen. Stat. § 14-208.40A."). Consequently, we vacate the trial court's Sex Offender Registration Orders and remand the issue of satellite-based monitoring for proper analysis pursuant to N.C. Gen. Stat. § 14-208.40A.

Conclusion

¶ 42 Accordingly, for the foregoing reasons, (I) there was no plain error in Defendant's trial and we affirm the Judgments entered upon the jury verdicts; and (II) (A) the trial court properly concluded Defendant's convictions in this case were sexually violent offenses and, thus, reportable offenses; however, (B) the trial court erred in ordering Defendant enroll in satellite-based monitoring without holding a hearing on the issue, and we vacate the Sex Offender Registration Orders and remand this matter to the trial court for further proceedings on satellite-based monitoring.

NO PLAIN ERROR AT TRIAL; AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DILLON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ANGELA MICHELLE McSWAIN, DEFENDANT

No. COA20-343

Filed 18 May 2021

1. Forgery—false check—authority to sign—sufficiency of evidence

In a prosecution for forgery of a check and uttering a false check, the State presented sufficient evidence that defendant signed the elderly victim's check without his authority where the State's evidence showed that the victim was a real person, that the victim's neighbor was the only authorized signatory on his checking account, and that defendant falsely represented that she had authority to sign the check in order to purchase makeup.

2. Evidence—illustrative—photocopy of check—witness's personal observations

In a prosecution for forgery of a check and uttering a false check, the trial court properly admitted a photocopy of the alleged false check as illustrative evidence of a witness's testimony regarding her personal observation of defendant writing the check.

Appeal by defendant from judgment entered 20 December 2019 by Judge William A. Wood II in Cleveland County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin Hukka, for the State.

Richard J. Costanza for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Angela Michelle McSwain ("Defendant") appeals pursuant to N.C. Gen. Stat. § 7A-27(b) from judgment entered after a jury found her guilty of forgery of an endorsement pursuant to N.C. Gen. Stat. § 14-120, uttering a forged check pursuant to N.C. Gen. Stat. § 14-120, and attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. On appeal, Defendant argues that the State failed to prove the element of falsity for the offenses of forgery of an endorsement and uttering a forged check. After careful review, we find no error.

I. Factual & Procedural Background

¶ 2 The evidence at trial tended to show the following: Malcom Parker ("Mr. Parker") was a long-time friend and next-door neighbor of John McGinnas ("Mr. McGinnas"). He served as the power of attorney of Mr. McGinnas from early 2018 up until Mr. McGinnas' death on 12 September 2019. Mr. Parker testified that Mr. McGinnas' sister appointed him attorney-in-fact when Mr. McGinnas' health began to decline rapidly, and she was living in Australia. In his role as Mr. McGinnas' attorney-in-fact, Mr. Parker controlled Mr. McGinnas' finances, "look[ed] after his welfare," and made periodic visits to his house to check on the property.

¶ 3 Mr. Parker paid Mr. McGinnas' bills as well as received and reviewed his bank statements from HomeTrust Bank as part of his duty to manage finances. To sign a check on behalf of Mr. McGinnas, Mr. Parker would sign as "John L. McGinnas" and write above the signature, "Malcom Parker" and "Power of Attorney." Mr. Parker testified he never gave Mr. McGinnas' checks to anyone nor did he give Defendant permission to use or write any of the checks.

¶ 4 During one visit to Mr. McGinnas' home in August 2018, Mr. Parker noticed that the window in Mr. McGinnas' vehicle had been "busted out" and items had been stolen from it. Two days later, Mr. Parker returned to Mr. McGinnas' home and found that it had also been broken into. Mr. Parker testified that heaters, old coins, and checkbooks were missing from the home. Both incidents were reported to the Cherryville Police Department. Mr. McGinnas was hospitalized throughout August 2018, and after being discharged, was admitted to a rest home.

¶ 5 In October 2018, Mr. Parker noticed a "discrepancy" in a check dated 15 September 2018, in reviewing the current monthly statement detailing Mr. McGinnas' checking account. Mr. Parker testified that he knew Mr. McGinnas' "signature because he couldn't hardly write" and did not recognize the signature on this check to be either Mr. McGinnas' or his own. He promptly notified HomeTrust Bank of the suspected fraudulent check and spoke with one of the bank's managers. Mr. Parker was under the impression that HomeTrust Bank had then contacted the Cherryville Police Department.

¶ 6 Mr. Parker also testified he personally knew Defendant because she lived in Mr. McGinnas' neighborhood, where Mr. Parker also used to reside. According to Mr. Parker, Mr. McGinnas did not have a relationship with Defendant and did not have many friends.

¶ 7 Wanda Weedman ("Ms. Weedman"), a Mary Kay Independent Beauty Consultant, also testified for the State. Ms. Weedman testified that she sold Mary Kay products at a party hosted by one of her customers on 15 September 2018. Among the attendees was Defendant, who approached Ms. Weedman and asked her if she would accept her elderly father's check to purchase the Mary Kay makeup products for her two friends who accompanied her to the party. According to Ms. Weedman, Defendant told her that she had "permission to use [her father's checking] account because she was his caretaker." Ms. Weedman agreed to accept the check so long as "all the information [was] correct on the check." She verified Defendant's driver's license and witnessed Defendant sign and write the check in the amount of $325.73. In the course of their purchases, Defendant and her two friends also provided Ms. Weedman with their email addresses and dates of birth.

¶ 8 Mark Stout ("Lt. Stout"), a lieutenant investigator with the City of Cherryville Police Department, testified under the State's direct examination that he was contacted by HomeTrust Bank regarding a suspected forged check. However, during cross-examination by Defendant's counsel, Lt. Stout recalled that it was Mr. Parker, not HomeTrust Bank, who initially contacted him regarding a check written on Mr. McGinnas' account while Mr. McGinnas was in a nursing home.

¶ 9 In his investigation, Lt. Stout learned that the check at issue was deposited by a Ms. Weedman in a bank located in Marion, and he obtained video surveillance of her depositing it. He contacted Ms. Weedman and spoke with her regarding the check. At first, she was unfamiliar with the check but recalled having received it after Lt. Stout provided the check amount and other details.

¶ 10 Ms. Weedman offered to help in the investigation and stated she could recognize the subject. She provided Lt. Stout with a written statement in which she gave her account of her interaction with Defendant, a detailed listing of the products Defendant purchased, and the contact information Defendant and her friends had given her. Ms. Weedman subsequently sent an email to Lt. Stout containing a photograph of Defendant she had obtained from a Facebook account in the same name as Defendant and wrote, "[t]his is a picture of the person [who wrote the check]." She testified that the photograph she gave Lt. Stout was a "picture of the lady that [she] saw at the party," and identified Defendant in open court as the same person who was depicted in the photograph.

¶ 11 On 14 November 2018, Defendant spoke voluntarily with Lt. Stout and completed a consent form in which she included her phone number

prior to the interview. In the interview, Defendant denied having attended the Mary Kay Cosmetics party on 15 September 2018.

¶ 12 Lt. Stout ran the driver's license number that was provided on the check and found that it differed by two digits from Defendant's actual number. Further, the phone number written on the check was off by only one digit from the phone number Defendant produced in her interview with Lt. Stout.

¶ 13 On 3 December 2018, the Cleveland County Grand Jury returned a true bill of indictment charging Defendant with forgery of an endorsement, uttering a forged instrument, and attaining habitual felon status. On 16 September 2019, the Cleveland County Grand Jury returned a superseding indictment charging Defendant with forgery of an endorsement and uttering a forged instrument. A photocopy of the alleged forged check was attached to the superseding indictment.

¶ 14 On 16 December 2019, Defendant's case came on for a jury trial in the Cleveland County Superior Court before the Honorable William A. Wood II. At the close of the State's evidence, Defendant moved to dismiss the case based on insufficiency of evidence and moved to dismiss the habitual felon indictment. The trial court denied both motions.

¶ 15 Defendant did not testify, nor did she present any evidence. At the close of all evidence, Defendant renewed her motions to dismiss, which were both denied. On 20 December 2019, the jury found Defendant guilty of forgery of a check, uttering a forged check, and attaining habitual felon status. Defendant gave oral notice of appeal in open court after the final judgment was entered.

II. Jurisdiction

¶ 16 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Motion to Dismiss

¶ 17 The sole issue on appeal is whether the trial court erred in denying Defendant's motion to dismiss the charges of forgery of a check and uttering a false check by finding substantial evidence Defendant acted without authority when she signed the check.

¶ 18 Defendant argues that the trial court erred in denying her motion to dismiss because the State failed to show substantial evidence of each element of the offenses charged.

A. Standard of Review

¶ 19 We review "the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

> A motion to dismiss for insufficient evidence is properly denied if there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

State v. Blakney, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014), *disc. rev. denied*, 367 N.C. 522, 762 S.E.2d 204 (2014) (citations and quotations omitted).

¶ 20 "The State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990).

B. Analysis

1. *Authority to Sign*

¶ 21 **[1]** In her first argument, Defendant relies on *State v. Phillips*, 256 N.C. 445, 124 S.E.2d 146 (1962) and *State v. Sinclair*, 45 N.C App. 586, 263 S.E.2d 811, *rev'd on other grounds*, 301 N.C. 193, 270 S.E.2d 418 (1980), in contending the State failed to prove her signature on Mr. McGinnas' check was false or, in other words, made without his authority. We disagree.

¶ 22 The necessary elements of the offense of forgery include: (1) a false making or alteration of some instrument in writing, (2) a fraudulent intent, and (3) the instrument must be apparently capable of effecting a fraud. *Phillips*, 256 N.C. at 447, 124 S.E.2d at 148 (citation omitted); *see*

also N.C. Gen. Stat. § 14-120 (2019); *State v. King*, 178 N.C. App. 122, 128, 630 S.E.2d 719, 723 (2006).

¶ 23 "The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810, 810 (1976); *see also* N.C. Gen. Stat. § 14-120; *State v. Conley*, 220 N.C. App. 50, 60, 724 S.E.2d 163, 170, *disc. rev. denied*, 366 N.C. 238, 731 S.E.2d 413 (2012).

¶ 24 When a person signs another's name to an instrument, it is presumed that the person has authority to do so. *State v. Shipman*, 77 N.C. App. 650, 653, 335 S.E.2d 912, 914 (1985). In response to this presumption, our Supreme Court has stated,

> if the purported maker [of an instrument] is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority. To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime.

Phillips, 256 N.C. at 448, 124 S.E.2d at 148 (quotation marks omitted).

¶ 25 Defendant asserts her case is analogous to *Phillips* and its line of cases because the State failed to meet its burden to show Defendant acted without authority in writing the check. She further maintains that the State could have called her case for trial while Mr. McGinnas was still alive to testify or, alternatively, it could have called witnesses from HomeTrust Bank to testify as to the individuals authorized to sign on Mr. McGinnas' account. We disagree that such testimony was necessary to establish a reasonable inference of Defendant's guilt of the offenses, and we find *Phillips* and *Sinclair* distinguishable from the case *sub judice*.

¶ 26 In *State v. Phillips*, the State did not present evidence to show the falsity of the instrument the defendant tendered, nor did it offer evidence that the purported maker of the check was a fictitious person. 256 N.C. at 447–49, 124 S.E.2d at 148. The sole evidence provided by the State was testimony showing that "no money was received for that check"—the trial court found this evidence was insufficient to conclude the check was signed without authority because the check could have been rejected by the bank for payment for any number of reasons, including insufficient funds. *Id.* at 449, 124 S.E.2d at 148–49. The State

made no effort to locate the purported maker of the check to prove the instrument was written without authorization. *Id.* at 449, 124 S.E.2d at 149. This Court held that the trial court erred by denying the motion to dismiss, and therefore, reversed the trial court's judgment. *Id.* at 449, 124 S.E.2d at 149.

¶ 27 In *State v. Sinclair*, the defendant signed her grandmother's name to withdrawal slips in order to withdraw funds from her grandparents' account. 45 N.C App. at 590, 263 S.E.2d at 814. At issue in *Sinclair* was whether the defendant acted without authority in withdrawing the funds. *Id.* at 590, 263 S.E.2d at 814. The defendant's grandmother testified on behalf of the State that she had given her granddaughter authority. *Id.* at 591, 263 S.E.2d at 814. The *Sinclair* Court noted all the evidence, even when taken in the light most favorable to the State, "support[ed] only the inference that [the] defendant was authorized to sign the withdrawal slips . . . ." *Id.* at 590–91, 263 S.E.2d at 814.

¶ 28 In this case, the State presented evidence tending to show Defendant wrote a check on Mr. McGinnas' banking account weeks after Mr. McGinnas' vehicle and house break-ins. There was a driver's license number and a phone number handwritten on the check, which were substantially similar to Defendant's legitimate driver's license number and phone number. Defendant falsely represented to Ms. Weedman that her father was the maker of the check, and had given her permission to write it. At the time the check was written, Mr. McGinnas was admitted into the hospital. Mr. McGinnas had no family other than a sister who died shortly before his death, and he had no children. Mr. Parker was sole power of attorney for Mr. McGinnas and handled all of his financial matters.

¶ 29 The State presented uncontroverted, substantial evidence to show Mr. McGinnas was a real person. Moreover, the State presented substantial evidence Mr. Parker was the only authorized signatory on Mr. McGinnas' checking account at the time the check in question was written. Unlike *Sinclair*, where the relationship between the defendant and the check maker was unchallenged, the relationship between Defendant and Mr. McGinnas is disputed. In addition, there is substantial circumstantial evidence to allow a jury to infer that the check was forged, and Defendant falsely represented to Ms. Weedman that she had authority to sign the check on behalf of Mr. McGinnas as his daughter. *See State v. Dunbar*, 47 N.C. App. 623, 628, 267 S.E.2d 577, 580–81 (1980) (holding the lack of the defendant's name on the bank's signature card was "sufficient circumstantial evidence from which the jury could conclude

that defendant lacked authorization to draw the check"); *see also State v. Seraphem*, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

¶ 30 Contrary to *Phillips* and *Sinclair*, the facts in this case present substantial evidence tending to show Defendant wrote and signed Mr. McGinnas' check without his authority, in viewing the evidence in the light most favorable to the State. *Blakney*, 233 N.C. App. at 518, 756 S.E.2d at 846. Although there are contradictions in the evidence as to whether Mr. McGinnas had children and whether he authorized the writing of the check, these factual inconsistencies were for a jury to resolve. *See Franklin*, 327 N.C. at 172, 393 S.E.2d at 787.

2. Illustrative Evidence

¶ 31 **[2]** In her second argument, Defendant asserts that the trial court erred by considering the check as "substantive proof of what it depicted" when it ruled on Defendant's motion to dismiss, after the check was admitted during Ms. Weedman's testimony as illustrative evidence only. We disagree.

¶ 32 N.C. Gen. Stat. § 8-97 provides:

> [a]ny party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

N.C. Gen. Stat. § 8-97 (2019).

¶ 33 "Ordinarily photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words." *State v. Gardner*, 228 N.C. 567, 572, 46 S.E.2d 824, 828 (1948). "Photographs are admissible for illustrative purposes if they fairly and accurately illustrate the subject of a witness's testimony." *State v. Little*, 253 N.C. App. 159, 168, 799 S.E.2d 427, 433 (2017) (citation omitted).

¶ 34 Here, it is undisputed that the photocopy of the check at issue, entered as Exhibit 1, was introduced by the State at trial for illustrative purposes only. Defendant's counsel objected to its admission, which the trial court overruled. Ms. Weedman testified as to the check she had previously personally observed, and the jury was shown Exhibit 1 following its admission.

¶ 35 Defendant, again relying on *Sinclair*, argues that the "trial court never received substantive evidence that the Defendant forged or uttered a 'check' as defined by statute." However, the *Sinclair* Court was confronted not with the issue of photocopies of checks as substantive evidence, but rather whether a witness' affidavits were admissible only to impeach the witness for her prior inconsistent statements or as substantive evidence. *Sinclair*, 45 N.C. App. at 591, 263 S.E.2d at 815. The Court held that the affidavits constituted inadmissible hearsay evidence; thus, the affidavits could not be used as substantive evidence. *Id.* at 591, 263 S.E.2d at 814–15.

¶ 36 Here, there is no indication the photocopy of the check was used as substantive evidence—rather the record reveals it was used solely as illustrative evidence. The trial court properly admitted the photocopy pursuant to N.C. Gen. Stat. § 8-97 to "fairly and accurately illustrate" the check, which was the subject of Ms. Weedman's testimony. *Little*, 253 N.C. App. at 168, 799 S.E.2d at 433. For the foregoing reasons, the State put forth substantial evidence Defendant forged and uttered an "instrument" as defined by N.C. Gen. Stat. § 14-119 (2019). *See* N.C. Gen. Stat. § 14-120.

V. Conclusion

¶ 37 We hold the trial court did not err in denying Defendant's motion to dismiss the charges of forgery of a check and uttering a false check because the State presented substantial evidence of all essential elements of the two offenses with which Defendant was charged. *See Phillips*, 256 N.C. at 447, 124 S.E.2d at 148; *Hill*, 31 N.C. App. at 249, 229 S.E.2d at 810; *see also* N.C. Gen. Stat. § 14-120. The photocopy of the check was properly admitted under N.C. Gen. Stat. § 8-97 to illustrate the testimony of a witness. For the foregoing reasons, we find no error.

NO ERROR.

Judges TYSON and COLLINS concur.

STATE v. PARKER

[277 N.C. App. 531, 2021-NCCOA-217]

STATE OF NORTH CAROLINA
v.
ANTWAN BERNARD PARKER, DEFENDANT

No. COA20-291

Filed 18 May 2021

1. Pretrial Proceedings—motion to suppress—oral ruling only—no material conflict in evidence

After hearing defendant's motion to suppress in a drug prosecution, the trial court was not required to memorialize its denial (after determining an officer had reasonable suspicion to search defendant's car based on smelling what the officer believed to be burnt marijuana) in a written order where there was no material conflict in the evidence. Defendant did not present any factual evidence and the court explained its rationale in its oral ruling.

2. Search and Seizure—vehicle search—probable cause—odor of burnt substance—hemp or marijuana—reasonable belief—additional supporting facts

When defendant was stopped as part of a seatbelt initiative, the officer had probable cause to search defendant's vehicle for contraband based on multiple factors—the officer's subjective belief, acquired from training and experience, that the burnt odor he smelled was marijuana; the admission from the vehicle's passenger that he had just smoked marijuana; and the passenger's production of a partially smoked marijuana cigarette that he had in his sock. Given that there were several facts in support of probable cause, the Court of Appeals determined it did not need to reach defendant's argument that, where the smell of burnt marijuana is indistinguishable from that of burnt hemp, a legal substance, a perceived odor of marijuana can no longer support probable cause. Probable cause did not need to be particularized to defendant (as opposed to his passenger) in order for the search of the entire vehicle to be lawful.

3. Appeal and Error—preservation of issues—special jury instructions—detailed explanation for request—objection to denial

In a drug prosecution, defendant was entitled to harmless error review upon properly preserving the denial of his request for two special instructions to the jury (regarding whether substances seized were controlled substances and whether the State had to prove that

defendant knew what the substances were). Defendant, through counsel, presented a written request and detailed oral explanation for the special instructions and objected when the trial court denied the request.

4. Criminal Law—jury instructions—drug prosecution—identity of controlled substance—matter of law

In a drug prosecution, the trial court did not invade the province of the jury by giving instructions that two substances not specifically listed in N.C.G.S. § 90-89 were controlled substances and did not err by denying defendant's request for a special instruction that the jury did not have to find that the substances were controlled substances. The classification of the substances was a legal and not a factual issue, and uncontroverted expert testimony established that the drugs were analogues within the catch-all provision for Schedule I controlled substances (N.C.G.S. § 90-89.1).

5. Criminal Law—jury instructions—controlled substance—knowingly possessed—extra instruction not warranted

In a drug prosecution, where defendant denied all knowledge that his vehicle contained illegal substances, he was not entitled to his special request to include a footnote from the pattern jury instruction that would have required the jury to find beyond a reasonable doubt that he knew the identity of the substances that were in his possession.

Appeal by Defendant from judgment entered 8 October 2019 by Judge Anna M. Wagoner in Cabarrus County Superior Court. Heard in the Court of Appeals 9 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General James M. Wilson, for the State.

Sharon L. Smith for the Defendant.

JACKSON, Judge.

¶ 1 The issues in this case are (1) whether the trial court properly denied Defendant Antwan Bernard Parker's ("Defendant") motion to suppress after determining that the search of his vehicle was supported by probable cause; and (2) whether the trial court properly instructed the jury regarding the nature of two controlled substances that Defendant was found to possess. Because we conclude that the trial court commit-

ted no error, we affirm the denial of the motion to suppress and discern no error in the judgment entered upon Defendant's convictions.

I. Factual and Procedural Background

¶ 2 On 15 January 2018, Officer Tony Peeler of the Kannapolis Police Department was running a seatbelt initiative on South Main Street when he noticed that the driver of a southbound Lincoln Town Car was not wearing a seatbelt. Upon pulling over the car, he observed Defendant in the driver's seat and passenger Billy Ray Neal in the front passenger seat. Officer Peeler asked for Defendant's license and registration, and while speaking with Defendant he began to notice the odor of burnt marijuana emanating from the vehicle. He also saw a large amount of cash scattered across Defendant's lap.

¶ 3 Based on the smell of marijuana, Officer Peeler returned to his patrol car to request backup to search the vehicle. Once two other officers had arrived, Officer Peeler re-approached the vehicle and told Defendant and Mr. Neal that he could smell the odor of marijuana coming from their car. Officer Peeler advised them that if they handed over everything they had, he would simply issue a citation for the possession of marijuana and Defendant and Mr. Neal would be released. In response, Mr. Neal admitted that he had "smoked a marijuana joint earlier" and pulled an object out of his sock, which Officer Peeler recognized to be a partially smoked marijuana cigarette.

¶ 4 Officer Peeler then asked Defendant and Mr. Neal to step out of the vehicle so he could perform a search, and they complied. The officers observed that Defendant appeared to be "fidgety" and "nervous" during the search. In the vehicle's center console, Officer Peeler found two black digital scales and a small round pill in a plastic bag. In a compartment on the driver's side door, Officer Peeler found an open pack of cigarillos containing a plastic bag with a green leafy substance that he believed to be marijuana. In a cup holder, Officer Peeler found a cloth containing two gray, rock-like substances that he believed to be narcotics. Officer Peeler subsequently placed Defendant under arrest. When asked about the substances, Defendant stated that he did now know what any of it was. Defendant was subsequently charged with two counts of felony possession of a Schedule I Controlled Substance.

¶ 5 Prior to trial, Defendant filed a motion to suppress the evidence gathered from the search of his vehicle, wherein he argued that Officer Peeler lacked probable cause to search the vehicle based solely on the smell of marijuana—arguing that the odor of burnt marijuana is indistinguishable from the odor of legal burnt hemp. A hearing was held

on the motion to suppress on 25 September 2019 in Cabarrus County Superior Court.

¶ 6 At the suppression hearing, Defendant submitted to the court a memo published by the North Carolina State Bureau of Investigation ("SBI") discussing the similarities between marijuana and legal hemp. When cross-examined about the memo, Officer Peeler testified that he was aware that hemp had been recently legalized in North Carolina, but that he had not received any training on identifying hemp. Officer Peeler testified that he was not aware that the odor of burnt hemp was similar to the odor of burnt marijuana.

¶ 7 However, Officer Peeler also testified that based on his fourteen years of law enforcement experience—during which he had made approximately 50-60 marijuana-related arrests—he believed the odor which he smelled (and the substance handed to him by Mr. Neal) to be marijuana. The trial court ultimately denied Defendant's motion to suppress, determining that Officer Peeler "had reasonable suspicion . . . to find that it was the odor of burned marijuana" based on his training and experience and based on Mr. Neal's admission that he had just smoked marijuana.

¶ 8 Following the suppression hearing, the Honorable Anna M. Wagoner presided over a one-day jury trial held on 7 October 2019 in Cabarrus County Superior Court. During trial, Adam Lewis of the SBI testified for the State as an expert in the forensic chemistry of controlled substances. Mr. Lewis identified the gray rock-like substance as 4.49 grams of Cyclopropylfentanyl—a fentanyl derivative compound. He stated that Cyclopropylfentanyl is a Schedule I controlled substance under Chapter 90 of the North Carolina General Statutes. Mr. Lewis identified the pill as N-ethylpentylone—a chemical compound similar to "bath salts," which is also included as a Schedule I controlled substance under Chapter 90.

¶ 9 During the charge conference, Defendant submitted written requests for two special jury instructions. The requested instructions read, in pertinent part, as follows:

> **Special Jury Instruction on Knowing Possession of Cyclopropyl Fentanyl**
>
> . . . For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed Cyclopropyl Fentanyl and that the defendant knew that what he possessed was Cyclopropyl Fentanyl. Cyclopropyl

> Fentanyl may be, but you are not required to find that it is, a controlled substance.
>
> **Special Jury Instruction on Knowing Possession of N-Ethylpentylone**
>
> . . . For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed N-Ethylpentylone and that the defendant knew that what he possessed was N-Ethylpentylone. N-Ethylpentylone may be, but you are not required to find that it is, a controlled substance.

¶ 10 The trial court declined to give either of Defendant's requested jury instructions, instead instructing the jury, in pertinent part, that:

> The defendant has been charged with possessing cyclopropylfentanyl, a controlled substance. For you to find the defendant guilty of this offense, the State must prove, beyond a reasonable doubt, that the defendant knowingly possessed cyclopropylfentanyl and cyclopropylfentanyl is a controlled substance.
>
> . . .
>
> With regard to count two, the defendant has been charged with possessing N-ethylpentylone, a controlled substance. For you to find the defendant guilty of this offense, the State must prove, beyond a reasonable doubt, that the defendant knowingly possessed N-ethylpentylone. N-ethylpentylone is a controlled substance.

¶ 11 The jury ultimately found Defendant guilty of both counts of felony possession of a controlled substance, and Defendant also pleaded guilty to attaining habitual felon status. He was sentenced to a consolidated active sentence of 43 to 64 months. Defendant gave notice of appeal in open court on 8 October 2019.

II. Analysis

¶ 12 Defendant raises two primary arguments on appeal, asserting that the trial court erred by: (1) denying his motion to suppress the evidence gathered from the search of his car; and (2) denying his requested jury instructions regarding the substances found in his car. Because we believe that the trial court committed no error, we affirm the denial of the

motion to suppress and discern no error in the judgment entered upon Defendant's convictions.

A. Denial of the Motion to Suppress

¶ 13 Defendant first challenges the trial court's denial of his motion to suppress evidence, arguing that the trial court erred by: (1) failing to memorialize its ruling in a written order; (2) failing to address the material issue of the indistinguishable scents of marijuana and legal hemp; (3) relying on Mr. Neal's statements to support its finding of probable cause; and (4) failing to show that probable cause existed particularized to Defendant, as opposed to Mr. Neal. In response, the State argues that Defendant has not adequately preserved the denial of the motion to suppress for our review, and that in any event the trial court's order contained no error because Officer Peeler possessed probable cause to search the vehicle. We affirm the trial court's order.

1. Preservation

¶ 14 The first issue before us is whether Defendant has adequately preserved for appellate review the issues raised in his motion to suppress—i.e., the admissibility of the evidence gathered during Officer Peeler's search of the vehicle. Defendant contends that because he raised an admissibility objection prior to Officer Peeler's testimony, this issue has been preserved, and we should review to determine whether the denial of the objection was reversible error. The State contends that because Defendant failed to renew his admissibility objection during Officer Peeler's trial testimony, plain error review should apply.

¶ 15 "To preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial." *State v. Golphin*, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal marks and citations omitted).

¶ 16 Here, defense counsel explained to the trial court prior to trial that she would have to object when the State introduced at trial evidence regarding the search. The court replied, "For the record that's fine." When Officer Peeler began to testify about the search of Defendant's car, defense counsel stated, "I'm going to object at this point, your Honor." The court replied, "Overruled at this point, for the record." We hold that Defendant's objection was properly preserved and that harmless error review should be applied. *See State v. Russell*, 92 N.C. App. 639, 644-45, 376 S.E.2d 458, 461-62 (1989) (conducting a harmless error review of the denial of a defendant's motion to suppress).

2. Merits of the Trial Court's Denial of the Motion to Suppress

¶ 17 We next address whether the trial court's failure to issue a written order memorializing its denial of the motion to suppress was error, and whether the trial court correctly determined that the search of Defendant's vehicle was supported by probable cause. We hold that no written order was required and that the trial court's probable cause analysis was correct.

a. Failure to Issue a Written Order

¶ 18 **[1]** Defendant argues that the trial court committed reversible error by denying his motion to suppress without a written order explaining its findings of fact and conclusions of law. Defendant is correct that when ruling on a motion to suppress, typically "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2019). However, under this statute, our Supreme Court has held that "[a] written determination setting forth the findings and conclusions is not necessary, but it is the better practice." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). Express findings of facts are required "only when there is a material conflict in the evidence," and the trial court is permitted to make its findings "either orally or in writing." *Id.* In other words, "[i]f the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015).

¶ 19 Here, the trial court issued only an oral ruling denying Defendant's motion to suppress:

> At this point I'm going to deny your motion to suppress. At this point I do obviously agree that [Officer Peeler] had reasonable suspicion and I'm going to find that it was the odor of burned marijuana and with the passenger admitting that he had just smoked some marijuana, that that did give the officer probable cause to search the automobile.

¶ 20 We thus begin our analysis by addressing whether there was a material conflict in the evidence before the trial court. We have previously held that "for purposes of section 15A-977(f), a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010).

¶ 21 For example, in *Baker* we held that a material conflict existed because "both the State and defendant presented evidence at the suppression hearing," and because the defendant and the arresting officer gave conflicting testimony regarding key factual issues (such as the defendant's location on the roadway when he was pulled over, the number of officers present during the arrest, and at what point the officers activated their lights and sirens). *Id.* at 384-87, 702 S.E.2d at 831-33. In contrast, in *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204 (2005), *rev'd and vacated in part on other grounds*, 361 N.C. 565, 648 S.E.2d 841 (2007), we held that no material conflict existed because the only evidence presented during the suppression hearing consisted of the undisputed testimony of law enforcement officers, and the defendant offered no evidence of his own (though he did briefly cross-examine the officers). *Id.* at 8-10, 620 S.E.2d at 209-10.

¶ 22 Here, at the suppression hearing the only factual evidence presented was the testimony of Officer Peeler, who described his interactions with Defendant on the day of the traffic stop. Defendant appears to argue that a material conflict existed because of the SBI memo that he introduced at the hearing (which discussed the similarities between legal hemp and marijuana), asserting that this memo introduced a conflict regarding whether the odor of marijuana was sufficient to support probable cause.

¶ 23 We disagree. Although the memo did perhaps call into question the State's legal theory regarding whether Officer Peeler's perception of the scent of marijuana provided probable cause to search the vehicle, this conflict was not a material issue of *fact*. Thus, because (1) Defendant introduced no evidence creating a material conflict in the evidence supporting the probable cause determination; and (2) the trial court issued a ruling from the bench to explain its rationale, we hold that the trial court was not required to enter a written order when denying Defendant's motion to suppress.

b. Probable Cause

¶ 24 **[2]** We turn next to whether the trial court's order correctly determined that the search of Defendant's vehicle was supported by probable cause. When reviewing a trial court's ruling on a motion to suppress, we review the trial court's findings of fact to determine whether they "are supported by competent evidence" and then review "whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (internal marks and citations omitted). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial

court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *Id.*

¶ 25 "The Fourth Amendment of the United States Constitution and Article 1, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005). Typically, a warrant is required to conduct a search unless a specific exception applies. *State v. Cline*, 205 N.C. App. 676, 679, 696 S.E.2d 554, 556 (2010). For example, the motor vehicle exception provides that the "search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999). Probable cause is generally defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty" of an unlawful act. *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (internal marks and citation omitted). In the context of the motor vehicle exception,

> [a] police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

State v. Degraphenreed, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018) (internal marks and citations omitted).

¶ 26 Defendant first argues that the search of his vehicle was unsupported by probable cause because Officer Peeler's impression of the scent of marijuana was insufficient to support a reasonable belief that the car contained contraband—given that the odor of burnt hemp and marijuana are indistinguishable. In support of this argument, Defendant relies on the SBI memo which he submitted during the suppression hearing.

¶ 27 As explained in the SBI memo, in 2015 North Carolina enacted the Industrial Hemp Act, which legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission. *See* S.L. 2015-299; N.C. Gen. Stat. § 106-568.50 (2019), *et seq*. Industrial hemp is a variety of the species Cannabis Sativa—the same species of plant as marijuana. The

difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol ("THC"), which is the psychoactive ingredient in marijuana. *See* N.C. Gen. Stat. § 106-568.51(7) (2019) (defining industrial hemp as any variety of the cannabis plant which contains less than 0.3% THC).

¶ 28 According to the SBI memo, the legalization of hemp poses some novel issues for law enforcement, as "[t]here is no easy way for law enforcement to distinguish between industrial hemp and marijuana" and "[t]here is currently no field test which distinguishes" between the two substances.[1] The memo further explains as follows:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.
>
> . . .
>
> [W]hen a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp. Police narcotics K9's cannot tell the difference between hemp and marijuana because the K9's are trained to detect THC which is present in both plants. Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons.
>
> The inability for law enforcement to distinguish the difference between hemp and marijuana is problematic in all marijuana prosecutions[.] There is at least once District Attorney's Office in NC which is

1. The memo was published by the SBI in 2019 in response to then-pending Senate Bill 315—legislation which sought to clarify whether the possession of hemp is also legal within the state. S.B. 315 was eventually signed by the Governor and enacted on 12 June 2020, though the final version of the law did not clarify the legality of hemp possession. The memo is available for viewing at *Industrial Hemp/CBD Issues*, State Bureau of Investigations, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf.

> currently not prosecuting marijuana cases due to the inability of law enforcement to distinguish the difference between hemp and marijuana.

¶ 29 The legal issues raised by the recent legalization of hemp have yet to be analyzed by the appellate courts of this state. As the State correctly notes, prior to the legalization of hemp, our courts have typically held that the odor of marijuana standing alone is sufficient to support probable cause to search a vehicle. *See*, *e.g.*, *State v. Mitchell*, 224 N.C. App. 171, 175, 735 S.E.2d 438, 442 (2012) ("[T]he odor of marijuana alone is sufficient to constitute probable cause."). Our courts have also previously held that police officers are entitled to identify marijuana based on a simple visual inspection. *See*, *e.g.*, *State v. Fletcher*, 92 N.C. App. 50, 56-57, 373 S.E.2d 681, 685-86 (1988) (holding that a police officer's visual identification of a substance as marijuana provided a sufficient basis for conviction of a marijuana offense).

¶ 30 Defendant's appeal raises the possibility that these holdings may need to be re-examined. If the scent of marijuana no longer conclusively indicates the presence of an illegal drug (given that legal hemp and illegal marijuana apparently smell the same), then the scent of marijuana may be insufficient to show probable cause to perform a search. Likewise, if the sight of marijuana no longer conclusively identifies the presence of an illegal drug (given that legal hemp plants and illegal marijuana plants look identical), then a police officer may not be able to rely on a visual identification of marijuana alone to support probable cause.

¶ 31 However, in the case before us today we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle. That is because in this case Officer Peeler had more than just the scent of marijuana to indicate that illegal drugs might be present in the car. Officer Peeler testified that he first began to develop a suspicion of illegal activity upon noticing the scent of burnt marijuana while speaking with Defendant and Mr. Neal at the traffic stop. Officer Peeler then asked Defendant and Mr. Neal whether there was any marijuana in the vehicle, and Mr. Neal "advised [that] he smoked a marijuana joint earlier" and then "reached into his left sock and pulled out a partially smoked marijuana joint."

¶ 32 Thus, there were three pieces of evidence supporting Officer Peeler's probable cause to search Defendant's vehicle: (1) the scent of what Officer Peeler believed to be burnt marijuana emanating from the vehicle; (2) Mr. Neal's admission that he had just smoked marijuana; and (3) the partially smoked marijuana cigarette which Mr. Neal produced

from his sock. We are satisfied that these three factors combined were sufficient to provide probable cause to search the vehicle. As we have previously held, a person's admission of a crime to law enforcement is typically sufficient to support a finding of probable cause:

> People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime . . . carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

State v. Arrington, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984) (quoting *United States v. Harris*, 403 U.S. 573, 583 (1971)). Under this standard, Mr. Neal's admission to having just smoked marijuana carried its own indicia of credibility, and this admission (combined with the physical evidence that Mr. Neal produced from his sock) led Officer Peeler to reasonably believe that the vehicle would contain contraband materials.[2]

¶ 33 Finally, Officer Peeler's own subjective belief that the substance he smelled was marijuana was additional evidence supporting probable cause—even if his belief might ultimately have been mistaken. As the United States Supreme Court has recognized,

> [t]he Fourth Amendment prohibits unreasonable searches and seizures. Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.
>
> . . .

2. Though Defendant raised several potentially meritorious objections to the admission of Mr. Neal's statements at the suppression hearing, Defendant has abandoned these issues by failing to discuss them in his appellate brief. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the [parties'] several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018) ("[I]t is the appellant's burden to show error occurring at the trial court, and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein.").

> To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection . . . . The limit is that the mistakes must be those of reasonable men.

Heien v. North Carolina, 574 U.S. 54, 57-61 (2014) (internal marks and citations omitted).

¶ 34 In his final challenge to the suppression ruling, Defendant contends that the search of his car was unlawful because the evidence failed to establish probable cause particularized to Defendant, as opposed to Mr. Neal. Defendant cites a case from the United States Court of Appeals for the Fourth Circuit in support of his assertion that "the presence of marijuana does not of itself authorize the police either to search any place or to arrest any person in the vicinity," absent particularized evidence of who the marijuana belongs to. *See United States v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004). This argument is unavailing, as this Court is not bound by law from federal circuit courts. *See State v. Anderson*, 254 N.C. App. 765, 774, 804 S.E.2d 189, 195 (2017) ("[O]rdinarily, this Court is not bound by the rulings of the United States Circuit Courts nor the rulings of other federal courts.") (internal marks and citation omitted).

¶ 35 In contrast, under North Carolina law, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336 (2018) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)). Accordingly, because here Officer Peeler's observations and Mr. Neal's admission provided probable cause to search Defendant's vehicle, Officer Peeler was legally entitled to search every part of the vehicle for the presence of marijuana. Defendant's arguments are thus overruled, and we affirm the trial court's denial of the motion to suppress.

B. Jury Instructions

¶ 36 Defendant next claims that the trial court erred by denying his requested special jury instructions regarding the possession of the two allegedly controlled substances—Cyclopropylfentanyl and N-ethylpentylone. He further contends that the instructions that were ultimately provided by the trial court were erroneous in two respects. First, he asserts that the trial court erred by expressly informing the jury that these two drugs were controlled substances—rather than letting the jury decide the matter on their own—as this relieved the State of its

burden of proof on a disputed factual issue and invaded the province of the jury as fact-finder. Second, he argues that the trial court committed a similar error by failing to inform the jury that a defendant must be aware of the identity of the substances he possessed in order to be found guilty. We disagree, and find no error in the trial court's jury instructions.

1. Preservation

¶ 37 **[3]** The State once again begins by arguing that the jury instructions issue has not been properly preserved for appellate review, and that plain error review should apply. Defendant disagrees, contending that because he did raise an objection to the jury instructions during a conference with the trial court, we should review this issue to determine whether any error committed by the trial court was harmless beyond a reasonable doubt. We agree with Defendant.

¶ 38 During the charge conference, Defendant presented his two proposed special jury instructions, and explained why these special instructions were more appropriate than the pattern jury instructions. Defendant's written request for the special jury instructions was, in and of itself, sufficient to preserve his challenge for appeal. *See Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490 (2000) ("[When] a party submits a written request for instructions during the charge conference, that party need not object to the instructions as read in order to properly preserve his appeal as to those instructions.").

¶ 39 Moreover, defense counsel generally explained her reasoning for the two requested instructions:

> **[Defense Counsel]:** On the pattern [instruction], the recommended change is to add [the footnote text] to the end of the first sentence of the second paragraph. So where it says in the pattern jury instruction, "For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed," in this case cyclopropylfentanyl, and then the footnote suggests to add the language there, which I do propose, and "that the defendant knew that what he possessed was cyclopropylfentanyl." That's the first suggested change.
>
> The second suggested change is somewhat unusual, but in this specific case, neither of these substances are on the schedule. So it's the defense position that the State has to prove that they are controlled

> substances. So it would be our contention that the language should be "cyclopropylfentanyl may be but the jury is not required to find that it is a controlled substance."

¶ 40 The following exchange then occurred with regard to the second issue—the identity of the controlled substance:

> **[Prosecutor]:** So, the State would object to any type of reference in the jury instruction . . . [to the language] "cyclopropylfentanyl may be but you are not required to find that it is a controlled substance." . . . I mean, that's not for the jury to determine.
>
> **[Trial Court]:** Okay. I think I'm going to deny your request.
>
> **[Defense Counsel]:** And Your Honor, with respect to that, I do believe, based on recent case law, I have to request that instruction. I'm not conceding –
>
> **[Trial Court]:** Okay. I will note your objection to my denial for giving it.

¶ 41 We hold that this exchange demonstrates that the first issue—the jury instructions on the identity of the controlled substance—was properly preserved. Defense counsel explained in detail her reasoning for requesting this special instruction on the identity of the controlled substance, the prosecutor explained why he opposed this instruction, and the trial court ultimately denied it. Defense counsel then stated that she was "not conceding" the issue, and the trial court, "note[d]" her objection to the denial. This is sufficient to preserve this issue for purposes of Rule 10(a)(2).

¶ 42 With regard to the other issue—the knowing possession issue—the following exchange occurred:

> **[Trial Court]:** And then the other thing was –
>
> **[Prosecutor]:** That he knew that he possessed the cyclopropylfentanyl?
>
> **[Trial Court]:** Well, that he knew it was . . . . [Defense counsel] wants me to give an instruction saying that he had to know what it was he possessed.
>
> **[Defense Counsel]:** Correct, which is indicated in the footnote, and the case references State v. Boone,

correct. And the testimony has been pretty consistent that he always said he didn't know what it was.

. . .

[Trial Court]: I am going to decline to give it, but you may argue . . . that it was not knowingly, that he didn't know what it was or whatever, but I just will not give that portion.

[Defense Counsel]: And I understand, but again, it's the State's burden to prove that to both parts of that element.

[Trial Court]: Yes. Okay. Anything else?

[Prosecutor]: Well, just so I'm clear. So, are you allowing defense counsel to argue that the defendant did not know that he was possessing a scheduled controlled substance?

[Trial Court]: She can argue that if she wants to . . . [S]he can say even if he possessed it, the law says it has to be knowingly, and we contend it's not knowingly.

[Defense Counsel]: And that is a correct statement of the law.

[Prosecutor]: Well, but I think the more correct statement of the law is that the possession is knowingly possessed, not knowingly possessed that substance.

[Trial Court]: Well, knowingly possessed a controlled – knowingly modifies possessed.

[Prosecutor]: Correct.

[Trial Court]: Yes, but we're not saying knowingly possessed this gavel. I mean, you have to know what it is you're possessing.

[Defense Counsel]: And the courts have consistently said that knowingly applies to that as well.

[The Court]: I'm going to allow her to argue that, and I'll note your objection to it.

¶ 43 This exchange demonstrates that the second issue—the knowing possession issue—was also properly preserved. After defense counsel explained her reasoning for requesting the knowing possession instruction, the trial court responded that it would not give the instruction, but nevertheless would allow her to argue this issue to the jury. The prosecutor then sought to clarify what exactly the court was allowing defense counsel to argue to the jury, and noted that he thought defense counsel's argument was an incorrect statement of law. The court finally reiterated that nevertheless it would "allow her to argue that" and "*note your objection to it.*"

¶ 44 The State argues that this exchange was ambiguous, and could have meant that the trial court was simply noting the prosecutor's objection to the court's decision to allow defense counsel to argue the knowing possession issue to the jury. Defendant, however, argues that this exchange represented the trial court noting defense counsel's objection to the denial of her earlier requested jury instruction. We agree with Defendant on this point—the objection which the trial court "noted" was defense counsel's objection to the jury instructions. The trial court's "note your objection to it" statement mirrors the language the trial court used to deny defense counsel's first objection to the earlier controlled substance instruction. Though it is true that defense counsel could have perhaps used clearer language in making her objection, as we have previously held "[t]he fact that counsel did not say the words 'I object' is not reason to deny appellate review" when counsel's intention was clear from the context. *State v. Rowe*, 231 N.C. App. 462, 470, 752 S.E.2d 223, 228 (2013).

¶ 45 We therefore hold that Defendant has preserved both of his jury instruction arguments for appellate review and that harmless error review is appropriate. *See State v. Steen*, 376 N.C. 469, 487, 852 S.E.2d 14, 26 (2020) ("[W]e evaluate the prejudicial effect of the delivery of [an erroneous] instruction using our traditional harmless error standard, which requires the defendant to show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.") (internal marks and citation omitted).

2. Merits of the Requested Jury Instructions

¶ 46 Defendant raises a two-fold challenge, arguing both that the trial court erred by failing to give his requested special jury instructions, and that the instructions which the court did provide misstated the applicable law. In general, when a party requests a special jury instruction,

a trial court "must give [the] requested instruction that is supported by both the law and the facts." *State v. Nicholson*, 355 N.C. 1, 67, 558 S.E.2d 109, 152 (2002). If the requested jury instruction contains no errors, the trial court should give the instruction to the jury "in substance"—though there is no requirement that the court use "the exact language requested" by the defendant. *Id.* However, if the requested jury instruction contains any errors of fact or law, the trial court acts properly in refusing it. *State v. Shepherd*, 156 N.C. App. 603, 609, 577 S.E.2d 341, 345 (2003).

¶ 47 As for Defendant's challenge to the jury instructions that were ultimately utilized by the trial court, we conduct a de novo review. *See State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed de novo by this Court."). However, we are also mindful that "[i]nstructions that as a whole present the law fairly and accurately to the jury will be upheld," and that "one isolated piece that might be considered improper or wrong on its own will not be found sufficient to support reversal." *State v. Roache*, 358 N.C. 243, 303-11, 595 S.E.2d 381, 419-24 (2004).

a. Identity of the Controlled Substances

¶ 48 **[4]** We first address whether the trial court erroneously invaded the province of the jury by instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances. Defendant requested the following special instructions regarding the two possession offenses:

> For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed [substance] and that the defendant knew that what he possessed was [substance]. [Substance] may be, but you are not required to find that it is, a controlled substance.

¶ 49 The trial court declined to give these instructions, instead instructing the jury in accordance with N.C.P.I.-Crim. 260.10 that:

> [T]he defendant has been charged with possessing [substance], a controlled substance. For you to find the defendant guilty of this offense, the State must prove, beyond a reasonable doubt, that the defendant knowingly possessed [substance]. [Substance] is a controlled substance.

¶ 50 Defendant argues that because Cyclopropylfentanyl and N-ethylpentylone are not specifically listed as named controlled sub-

stances under Schedule I, *see* N.C. Gen. Stat. § 90-89 (2019), their identity was a factual matter within the province of the jury. Though there was expert testimony tending to show these were controlled substances, Defendant asserts that it was still up to the jury to either believe or disbelieve this expert testimony.

¶ 51 We find Defendant's argument unavailing, and hold that the trial court properly denied Defendant's request to allow the jury to determine whether or not Cyclopropylfentanyl and N-ethylpentylone were controlled substances. We reach this holding for two reasons: (1) the classification of Cyclopropylfentanyl and N-ethylpentylone was a legal issue within the province of the trial court; and (2) even if the classification of these substances was a factual issue, Defendant was not prejudiced because the undisputed evidence demonstrated that Cyclopropylfentanyl and N-ethylpentylone were controlled substances.

¶ 52 First, it is well-established that it is the province of the trial court to instruct the jury on matters of law, while the jury should be left free to reach its own conclusions on matters of fact. *See State v. Cuthrell*, 235 N.C. 173, 174, 69 S.E.2d 233, 234 (1952). Whether a given substance is classified as a controlled substance under our criminal statutes is a legal issue that involves that application of legal reasoning. In North Carolina, the classification of controlled substances is governed by a "statutory framework" that "lists and categorizes various drugs, substances, and immediate precursors into six schedules." *State v. Williams*, 242 N.C. App. 361, 365, 774 S.E.2d 880, 884 (2015). Schedule I substances are those that "have been deemed to require the highest level of state regulations" and that have "a high potential for abuse." *Id.* Chapter 90-89 of our General Statutes lists all of the various Schedule I substances, by both their "chemical and trade names." *Id.* However, the statute also contains a "catch-all" provision encompassing other Schedule I substances that are not specifically named therein. *Id.* This catch-all provision states that "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any State law as a controlled substance in Schedule I." N.C. Gen. Stat. § 90-89.1 (2019).

¶ 53 Here, Defendant is correct that Cyclopropylfentanyl and N-ethylpentylone do not expressly appear among the listed controlled substances in N.C. Gen. Stat. § 90-89. However, the trial court did not err in concluding as a matter of law—and in thereby instructing the jury—that these substances nonetheless constituted Schedule I controlled substances. The uncontroverted expert testimony at trial demonstrated that these substances were both controlled substance analogues fitting within the catch-all provision of Schedule I, with Cyclopropylfentanyl

being a Schedule I fentanyl derivative and N-ethylpentylone being a Schedule I cathinone derivative.

¶ 54 Based on this undisputed evidence, we conclude that it was proper for the trial court to instruct the jury as a matter of law that these two substances were Schedule I controlled substances. *See State v. Smith*, 305 N.C. 691, 702-03, 292 S.E.2d 264, 272 (1982) (holding that the trial court did not invade the province of the jury in a murder case by informing them that "there was no evidence of any just cause or legal provocation to kill," as this issue was "a matter of law, not of fact" and amounted to "little more than a summary of the pertinent evidence upon a particular aspect of the case"); *see also State v. Morgan*, 263 N.C. App. 711, 822 S.E.2d 909, 2019 WL 438575, at *6 (2019) (unpublished) (holding that there was sufficient evidence to demonstrate that ethylone—a substance not specifically listed under Schedule I—was a controlled substance where an expert chemist "testified, with no objection or opposing evidence submitted by defense counsel, that ethylone [was] . . . a known Schedule I controlled substance").[3]

¶ 55 Moreover, even assuming *arguendo* that the trial court erred in instructing the jury that these were controlled substances, any such error was isolated and harmless. The uncontroverted record evidence demonstrated that Cyclopropylfentanyl and N-ethylpentylone were controlled substances. Adam Lewis of the SBI testified for the State as an expert in the forensic chemistry of controlled substances. Mr. Lewis identified the gray rock-like substance as 4.49 grams of Cyclopropylfentanyl—a fentanyl derivative compound. He stated that Cyclopropylfentanyl is a Schedule I controlled substance under Chapter 90 of the North Carolina General Statutes. Mr. Lewis identified the pill as N-ethylpentylone—a chemical compound similar to "bath salts," which is also included as a Schedule I controlled substance under Chapter 90.

¶ 56 Defendant did not object to Mr. Lewis' qualifications as an expert in the field of forensic chemistry of controlled substances, and Defendant offered no competing evidence to challenge Mr. Lewis' conclusion that these substances were controlled substances. Indeed, in defense counsel's closing argument, the defense expressly conceded that "[w]e're not going to debate that . . . it was a schedule one controlled substance," and that the defense "agree[d] for purposes of this argument that it was a controlled substance."

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3. We also note that the instruction provided to the jury corresponded with North Carolina Pattern Criminal Instruction 260.10—Possession of a Controlled Substance. "Use of the pattern instructions is encouraged." *State v. Garcell*, 363 N.C. 10, 49, 678 S.E.2d 618, 642 (2009).

¶ 57 Accordingly, given that there was no evidence presented to the jury to suggest that Mr. Lewis' expert conclusions were incorrect, or to suggest that these substances were anything but controlled substances, defendant has failed to demonstrate any "reasonable possibility" that this alleged minor instructional error had any impact on the jury's ultimate verdict. *Steen*, 376 N.C. at 487, 852 S.E.2d at 26. *See also State v. Wells*, 290 N.C. 485, 497, 226 S.E.2d 325, 333 (1976) (holding that the trial court's factual instruction, "while erroneously invading the province of the jury, was not prejudicial" because all of the evidence supported this factual instruction and the defendant "never contended otherwise").

b. Knowing Possession

¶ 58 **[5]** The final issue we must address is Defendant's contention that the jury instructions failed to properly instruct the jury on the "knowing" element of the offense. To sustain a conviction for felony possession of a controlled substance, "the substance must be possessed and the substance must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (citation omitted). Defendant argues that here, because he denied knowing the identity of the substances that were found in his vehicle, he was entitled to a jury instruction informing the jury that he must have known that what he possessed was a controlled substance to be found guilty. Specifically, Defendant contends that the trial court should have instructed the jury in accord with Footnote 2 of the pattern jury instruction, which provides that:

> If the defendant contends that the defendant did not know the true identity of what defendant possessed, add this language to the first sentence [of the instructions]: "and the defendant knew that what the defendant possessed was (*name substance*). *S. v. Boone*, 310 N.C. 284, 291 (1984)."

N.C. P.I. Crime 260.10.

¶ 59 We disagree and find no error in this aspect of the jury instructions. Our Supreme Court has held that when a defendant denies knowing the identity of a controlled substance that he was found to possess, the issue of the defendant's knowledge becomes "a determinative issue of fact" about which the trial court should instruct the jury. *State v. Boone*, 310 N.C. 284, 294, 311 S.E.2d 552, 559 (1984), *superseded by statute on other grounds as recognized in State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 573-74 (2012).

¶ 60 This principle was recently explored in depth in *State v. Galaviz-Torres*, 368 N.C. 44, 772 S.E.2d 434 (2015). There, the defendant was convicted of trafficking in cocaine after 400 grams of cocaine were found in a gift bag on the floor of his van. *Id.* at 45-46, 772 S.E.2d at 435. However, he maintained that "he did not know that the van contained cocaine, and that the cocaine seized from the van did not belong to him." *Id.* at 46, 772 S.E.2d at 435. On appeal, the defendant argued that the trial court erred by failing to provide the jury with the footnote pattern jury instruction regarding knowing possession of a controlled substance[4]—asserting that the issue of his knowing possession was a material factual issue that should be decided by the jury. *Id.* at 48, 772 S.E.2d at 436-37.

¶ 61 The Supreme Court first explained that while knowing possession is an element that typically may be implied from the circumstances of the crime,

> when a defendant denies having knowledge of the controlled substances that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes a determinative issue of fact about which the trial court must instruct the jury. As a result, given that defendant denied having knowingly possessed the cocaine found in the van that he was driving, the ultimate issue raised by [this case] is whether the trial court's instructions . . . adequately informed the jury that, in order to convict defendant of the offenses with which he had been charged, it must find beyond a reasonable doubt that defendant actually knew that he had cocaine in his possession.

Id. at 49, 772 S.E.2d at 437.

¶ 62 After reviewing the relevant case law and the text of the requested footnote instruction, the Court ultimately concluded that the defendant was not entitled to the extra instruction because he had made a *wholesale denial* of any knowledge about the substances in his van. *Id.* The Court explained that the defendant might have been entitled to the extra instruction if he had simply denied knowledge "of the contents of the gift bag in which the cocaine was found," or if he had alternatively admitted that he possessed a substance "while denying any knowledge

4. The footnote pattern jury instruction requested by the defendant in *Galaviz-Torres* and the footnote jury instruction requested by Defendant here both contained identical language.

of the substance's identity." *Id.* at 51, 772 S.E.2d at 438. However, the defendant in *Galaviz-Torres* did neither—"[i]nstead, defendant simply denied having had any knowledge that the van he was driving contained either the gift bag or cocaine." *Id.* Thus, the Court concluded that,

> [a]s a result, since defendant did not contend that he did not know the true identity of what he possessed . . . the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in [the requested footnote] in this case.

Id.

¶ 63 We conclude that *Galaviz-Torres* is controlling in the present case. Here, although Defendant himself did not testify at trial, Officer Peeler described the statements that Defendant made to him during his arrest. Officer Peeler testified at various points that Defendant "denied having any illegal substances on him"; that Defendant "constantly said that he didn't know what none of it was"; and that Defendant "remained silent" when asked "who those substances belonged to."

¶ 64 Here, as in *Galaviz-Torres*, Defendant's statements to Officer Peeler amounted to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs. Defendant never specifically denied knowledge of the contents of the cloth in which the drugs were wrapped, nor did he admit that the substances belonged to him while claiming ignorance of their identity. Accordingly, we similarly conclude that "the prerequisite for giving the instruction in question simply did not exist in this case." *Id.* at 51, 772 S.E.2d at 438. Moreover, we note that defense counsel here was still allowed to explain to the jury during closing arguments that knowing possession was a required element of the offense, and that the instructions provided by the trial court required the State to prove that "the defendant knowingly possessed [substance]" and was "aware of its presence." Accordingly, because the instructions provided by the trial court presented the law fairly and accurately to the jury, we find no error in the trial court's use of the pattern jury instruction here.

III. Conclusion

¶ 65 The trial court properly denied Defendant's motion to suppress evidence because Officer Peeler possessed probable cause to search the vehicle based on the admissions of the passenger. The trial court committed no error in instructing the jury that Cyclopropylfentanyl

and N-ethylpentylone were controlled substances as a matter of law. Defendant was not entitled to the special instruction on knowing possession of a controlled substance because he did not meet the prerequisite required to provide this instruction.

NO ERROR.

Judges COLLINS and GORE concur.

STATE OF NORTH CAROLINA
v.
DARIS LAMONT SPINKS

No. COA20-541

Filed 18 May 2021

1. Constitutional Law—right to speedy trial—Barker factors—seven-year delay—mostly attributable to defendant—no prejudice shown

In a prosecution for taking indecent liberties with a child, the seven-year delay between defendant's arrest and his trial did not violate his right to a speedy trial where, under the four-factor balancing test in *Barker v. Wingo*, 407 U.S. 514 (1972), the delay mostly resulted from defendant frequently requesting new attorneys before waiving counsel and requesting standby counsel; any delay attributable to the State was made in good faith where a serious illness prevented the prosecution's lead witness from attending trial; defendant could not show that the seven-year separation from his daughter was due to his pretrial incarceration in this case where he was already serving time for prior criminal convictions; and defendant asserted that his main witnesses were difficult to contact but produced no evidence that they were actually unavailable or that he had attempted to subpoena them for trial.

2. Jury—motion for mistrial—suspected juror misconduct—inquiry by trial court

In a prosecution for taking indecent liberties with a child, where one of the jurors had spoken to his mother during a lunch break and subsequently changed his vote on the verdict, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. The court conducted a sufficiently thorough inquiry in which

the juror testified that he did not discuss the facts of the case with his mother or with anyone else, his conversation with his mother did not change his decision regarding the verdict, and that he based his vote solely on the evidence presented at trial.

3. Appeal and Error—preservation of issues—lifetime satellite-based monitoring—waived constitutional argument—Rule 2

In an appeal from an order imposing lifetime satellite-based monitoring (SBM), the Court of Appeals declined to invoke Appellate Rule 2 to review defendant's argument that lifetime SBM amounted to an unreasonable search under the Fourth Amendment. Defendant failed to raise this argument at his SBM hearing, demonstrate that he was any different from other defendants who failed to preserve their constitutional arguments, or argue specific facts showing that a manifest injustice would result if Rule 2 were not invoked.

4. Satellite-Based Monitoring—effective assistance of counsel—statutory right in satellite-based monitoring hearings—section 7A-451(a)(18)

In a case of first impression, an order imposing lifetime satellite-based monitoring (SBM) was reversed and remanded for a reasonableness hearing because defendant received ineffective assistance of counsel where his trial attorney did not object to the imposition of lifetime SBM, argue that lifetime SBM constituted an unreasonable search under the Fourth Amendment, or properly file a written notice of appeal from the SBM order in accordance with Appellate Rule 3. Although a constitutional right to effective assistance of counsel is unavailable to defendants in SBM proceedings (which are civil rather than criminal in nature), the statutory right to counsel in SBM proceedings under N.C.G.S. § 7A-451(a)(18) includes the right to effective assistance of counsel.

Appeal by defendant from judgment and order entered 17 May 2019 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Daris Lamont Spinks appeals from a judgment entered upon a jury's verdict finding him guilty of taking indecent liberties with a child, and from an order imposing lifetime satellite-based monitoring. After careful review, we hold that Defendant received a fair trial, free from error. However, because we conclude that Defendant received ineffective assistance of counsel at the satellite-based monitoring hearing, we reverse the order and remand for a new hearing on the State's application for lifetime satellite-based monitoring.

Background

Factual Background

¶ 2 In April of 2011, six-year-old K.S.[1] attended a sleepover birthday party for her best friend Keasia along with several other children, including Defendant's daughter Tootie. The party was held at the home of Keasia's mother, Defendant's half-sister. K.S. met Defendant at the party; he told her to call him "Uncle Lamont." At some point, Tootie was injured on the trampoline, and Defendant took her to his grandmother's house, where Defendant resided. Tootie's mother picked up Tootie there, and Defendant went to a nightclub with his cousin. Defendant returned to Keasia's home later that night.

¶ 3 After the children jumped on a trampoline in the front yard, Keasia and K.S. went inside and watched television in Keasia's bedroom. Eventually, the two girls fell asleep in Keasia's bed. K.S. awoke when she heard someone enter the room. Defendant began touching K.S.'s back. Defendant then pulled down K.S.'s pants, "pulled his private part out and put it in [K.S.'s] behind." Defendant stopped after approximately ten minutes and left the room. Keasia was in the bed with K.S. during the encounter.

¶ 4 The next morning, K.S. and Keasia told Keasia's mother that Defendant had raped K.S., but no one told K.S.'s mother. One year later, in March of 2012, K.S. told her mother and her aunt that Defendant had raped her.

¶ 5 On 25 June 2012, Defendant was arrested.

Procedural History

¶ 6 On 1 April 2013, a Guilford County grand jury returned indictments charging Defendant with first-degree sex offense of a child by an adult and taking indecent liberties with a child. Defendant was first represented

1. We refer to the child victim by the initials used by the parties in order to protect her identity.

by public defender Wayne Baucino. Upon his withdrawal, the trial court appointed attorney Joe Floyd to represent Defendant. Mr. Floyd represented Defendant for approximately three years, at which point Defendant sought to discharge him. On 15 September 2015, the trial court appointed attorney Alec Carpenter to represent Defendant.

¶ 7 On 22 August 2016, Mr. Carpenter moved to withdraw as Defendant's counsel. The trial court granted the motion and appointed attorney Aaron Wellman to represent Defendant.

¶ 8 Despite being represented by counsel, on 13 October 2016, Defendant filed a *pro se* motion for speedy disposition pursuant to N.C. Gen. Stat. § 15A-711. Defendant's case was thereafter calendared for trial for the week of 13 February 2017. However, on 1 February 2017, Defendant moved to continue trial of this matter, which the trial court granted. At the same hearing, the trial court also denied Defendant's 13 October 2016 motion for speedy disposition, concluding that the State had complied with its obligations pursuant to N.C. Gen. Stat. § 15A-711 by calendaring the matter for trial for 13 February 2017. The court further concluded that "all days from February 13th, 2017 through such date that Defendant, through Attorney Wellman, and the State . . . designate as an agreed-upon trial date shall not count against the six month period in which the State was required to proceed upon the filing of Defendant's motion dated October 13th, 2016."

¶ 9 While still represented by Mr. Wellman, on 1 May 2017, Defendant filed another *pro se* motion and request for dismissal, alleging a violation of his right to a speedy trial on the grounds that more than six months had elapsed since the filing of Defendant's motion for speedy disposition pursuant to § 15A-711.

¶ 10 On 22 October 2018, Defendant appeared with Mr. Wellman in Guilford County Superior Court before the Honorable Jerry Cash Martin, and made an oral motion to have Mr. Wellman removed "for cause." The trial court denied the motion to remove defense counsel for cause, but permitted Mr. Wellman to withdraw. Defendant then waived his right to the appointment of counsel, and the trial court allowed Defendant to proceed *pro se*, with Mr. Wellman serving as standby counsel.

¶ 11 On 13 November 2018, Defendant filed a *pro se* motion to dismiss the charges against him, alleging a violation of his constitutional right to a speedy trial. On 25 March 2019, Defendant filed another *pro se* motion to dismiss on the same basis.

¶ 12 The matter came on for trial at the 13 May 2019 criminal session of Guilford County Superior Court, the Honorable Michael D. Duncan

presiding. On 14 May 2019, the trial court heard Defendant's motion to dismiss on the ground that his Sixth Amendment right to a speedy trial had been violated. Defendant argued that he had been prejudiced by the delay because "a lot of the people that was ready to testify, it's hard for us to get in contact with them now." In particular, Defendant explained that he had intended to call his cousin, a truck driver, as an alibi witness, but "[i]t's hard to get in touch with truck drivers[.]" Furthermore, he stated that he had not seen his daughter since these allegations arose seven years prior.

¶ 13 The trial court made the following findings in open court regarding Defendant's motion to dismiss for a speedy-trial violation:

> [The] Court does find that over a period of time, [Defendant] has had numerous attorneys that -- because of the attorneys -- each new attorney being appointed and having to be brought up to speed, that there has been delay in this matter. The Court does find that that delay has been primarily as a result of [D]efendant's request for new attorneys. That is not totally the reason for all the delays, but that is partially the reason for delays[.]
>
> . . . .
>
> [T]he Court does find that the Honorable Jerry Cash Martin signed an order back on October 22nd, 2018; that [D]efendant had previously been appointed Aaron Wellman; that present for the State, Assistant [District] Attorney Mr. Hubbard; that [D]efendant at that time made an oral motion to have Mr. Wellman removed; that after hearing evidence, the Court in its discretion denied removing the attorney, but did allow Mr. Wellman to be discharged; that [D]efendant would be allowed to represent himself; that Mr. Wellman would remain as standby counsel.
>
> Again, the Court finds that the lead officer investigator in this case had a serious health condition. For a period of time, she was unable to be present for court. The Court has listened carefully to the arguments of [Defendant], and [Defendant] has indicated that -- or he claims that he's been prejudiced by the fact of this taking so long to be tried that a lot of the witnesses, although they are still around; that one

> is a long-distance truck driver and they're hard to get up with; that other witnesses are hard to get up with. The Court didn't hear that any of them are not available or that he subpoenaed any of them and that they were unable to be served or anything of that nature.
>
> The Court does find that without any evidence that the [D]efendant[has] failed to show any prejudice in this matter as far as the length and delay. As a result, many of the continuances were based upon the fact that attorneys had to be appointed and given time to catch up to speed. The Court does note that it is [an] abnormal length of time from the date of the indictments and these cases till the date of this trial; however, based upon the totality of all the circumstances and the finding that the Court's made that there have been no prejudice, the Court is going to deny [D]efendant's motion to dismiss.

¶ 14 Defendant noted his objection for the record. Defendant then requested that the trial court appoint his standby counsel to represent him at trial. The trial court reappointed Mr. Wellman to serve as defense counsel.

¶ 15 On 17 May 2019, during jury deliberations, the trial court received a note from the jury foreperson, stating:

> One of the jurors spoke to his mother during lunch.
>
> He said "he did not discuss the case" but he "did get her opinion."
>
> He did change his vote on count #2.
>
> He did say this openly.

(Capitalization omitted). "Nathan Mercado" was written above the phrase "one of the jurors."

¶ 16 Defendant moved for a mistrial based on juror misconduct. The trial court questioned Mr. Mercado regarding the alleged misconduct. Mr. Mercado indicated that his conversation with his mother did not influence his opinion:

> THE COURT: . . . First of all, first question will be who is it that you spoke to when it says "his mother"?
>
> JUROR MERCADO: My mother.

> THE COURT: Okay. . . . What I do want to know is whether or not the discussion with your mother in any way changed your ultimate decision in this case.
>
> JUROR MERCADO: No. I was talking about one of her old cases. That's what we kind of -- we neared off to when she went to High Point about one of her cases. It wasn't -- I just asked her how she carried herself when she was in there.
>
> THE COURT: Okay. . . . So let me ask this. Whatever conversation or discussion that you may have had with your own mother, did it in any way change the ultimate decision in your -- as how you voted in this case?
>
> JUROR MERCADO: No, sir.
>
> THE COURT: Secondly, did you base your decision, whatever it may have been in this case, on anything other than the evidence that was presented here this week, the facts that were brought out in court that you find the facts to be, and the law as I've instructed you, have -- did you base your final decision on anything other than the evidence that was here in court and the law as I instructed you?
>
> JUROR MERCADO: No. I was only using the evidence.
>
> THE COURT: Okay. . . . One last question, Mr. Mercado. When you were indicating to the Court that you spoke with your mother because of cases -- case or cases she had had before, was that in regard to your mother serving on a jury?
>
> JUROR MERCADO: Yes. In High Point.
>
> THE COURT: Okay. . . . [I]n this note that I was given, it says you did not discuss the case with your mother. You've not discussed it . . . with your mother or anyone else? The facts . . . of this case or anything pertaining to this case?
>
> JUROR MERCADO: No, sir.

¶ 17 The trial court denied Defendant's motion for a mistrial, ruling as follows:

> [Juror Mercado] specifically indicated to the Court he based his decision on nothing except the evidence that's been presented in this case and the laws the Court had instructed him and on no other basis. He also indicated that whatever conversation he may have had, although it wasn't about this specific case, talking about his mother's past experiences did not in any way affect his overall decision in this case. Based upon those and other factors and in the Court's discretion, I am going to deny the motion for mistrial.

Defendant objected to the denial of the motion.

¶ 18 On 17 May 2019, the jury returned verdicts finding Defendant not guilty of first-degree sex offense of a child by an adult, but guilty of taking indecent liberties with a child. The trial court entered judgment upon the jury's guilty verdict and sentenced Defendant to 28 to 43 months' imprisonment. After a brief hearing, the trial court also ordered that Defendant register as a sex offender and enroll in satellite-based monitoring for the remainder of his natural life. Defendant gave oral notice of appeal from the judgment, and he subsequently petitioned this Court to issue its writ of certiorari to review the satellite-based monitoring order.

Discussion

I. Speedy Trial

¶ 19 **[1]** Defendant first asserts that his constitutional right to a speedy trial was violated because of the seven-year delay between his arrest and trial. We disagree.

A. Standard of Review

¶ 20 We review an alleged violation of a defendant's Sixth Amendment right to a speedy trial de novo. *State v. Wilkerson*, 257 N.C. App. 927, 929, 810 S.E.2d 389, 391 (2018). In reviewing the denial of a motion to dismiss for a speedy-trial violation, "[w]e review the superior court's order to determine whether the trial judge's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the judge's ultimate conclusions of law." *Id.* (citation and internal quotation marks omitted). In reviewing the conclusions of law, we "consider the matter anew and substitute our judgment for that of the trial court." *State v. Johnson*, 251 N.C. App. 260, 265, 795 S.E.2d 126, 131 (2016) (citation omitted).

B. Analysis

¶ 21 "The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 18 of the North Carolina Constitution guarantee the right to a speedy trial." *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986). "The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated." *Wilkerson*, 257 N.C. App. at 929, 810 S.E.2d at 392. "These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *State v. Carvalho*, 243 N.C. App. 394, 400, 777 S.E.2d 78, 83 (2015) (internal quotation marks omitted) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972)), *disc. review improvidently allowed and aff'd per curiam*, 369 N.C. 309, 794 S.E.2d 497 (2016), *cert. denied*, ___ U.S. ___, 199 L. Ed. 2d 19 (2017).

¶ 22 To determine whether a violation has occurred, this Court is tasked with considering and weighing each factor:

> [N]one of the four factors identified above [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533, 33 L. Ed. 2d at 118–19 (footnote omitted). As such, we consider each factor and engage in this "difficult and sensitive balancing process" below. *Id.*

i. Length of Delay

¶ 23 For the purposes of this factor, we consider the length of the delay between formal accusation and trial. *Johnson*, 251 N.C. App. at 266, 795 S.E.2d at 131. "It is well established that a defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment." *State v. Pippin*, 72 N.C. App. 387, 391, 324 S.E.2d 900, 904, *disc. review denied*, 313 N.C. 609, 330 S.E.2d 615 (1985); *see also*

State v. Lee, 218 N.C. App. 42, 52, 720 S.E.2d 884, 892 (considering delay between arrest and trial), *disc. review improvidently allowed*, 366 N.C. 329, 734 S.E.2d 571 (2012); *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996) (same).

¶ 24 "[T]he length of the delay is not *per se* determinative of whether [the] defendant has been deprived of his right to a speedy trial." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003); *see also Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84. "No bright line exists to signify how much of a delay or wait is prejudicial, but as wait times approach a year, a presumption of prejudice arises." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392. "This presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.* (citation and internal quotation marks omitted). Once the length of a delay has triggered a *Barker* inquiry, "we do not determine the right to a speedy trial by the calendar alone. Rather, we must consider the length of the delay in relation to the three remaining factors." *Lee*, 218 N.C. App. at 52, 720 S.E.2d at 892 (citation and internal quotation marks omitted).

¶ 25 Here, approximately 83 months, or seven years, passed between Defendant's arrest and trial. This delay is undoubtedly sufficient to trigger a *Barker* analysis. *See id.* (finding 22-month delay "unusual" and sufficiently lengthy to trigger a *Barker* analysis); *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656 (determining that a nearly three-year delay triggered a *Barker* analysis). We therefore proceed to consider the remaining *Barker* factors.

ii. Reason for Delay

¶ 26 Generally, the defendant "bears the burden of showing the delay was the result of *neglect* or *willfulness* of the prosecution." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392 (citation and internal quotation marks omitted). However, a "particularly lengthy" delay "creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2003). An 83-month delay is undoubtedly sufficient to create this prima facie showing. *See id.* at 586, 570 S.E.2d at 903 (finding an approximately 31-month delay sufficient); *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656 (finding an approximately 35-month delay sufficient to create prima facie showing of negligence).

¶ 27 Upon a prima facie showing of prosecutorial neglect by a lengthy delay, "the burden shifts to the State to rebut and offer explanations for the delay." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392. Once the State offers a valid reason "for the lengthy delay of [the] defendant's trial, the burden of proof shifts back to the defendant to show neglect or willfulness by the prosecutor." *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902.

¶ 28 Not all delays are viewed as neglectful or willful:

> The State is allowed good-faith delays which are reasonably necessary for the State to prepare and present its case, but is proscribed from purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. Different reasons for delay are assigned different weights, but only valid reasons are weighed in favor of the State.

Wilkerson, 257 N.C. App. at 930–31, 810 S.E.2d at 393 (emphasis, citations, and internal quotation marks omitted). A missing witness for the State is a "valid reason," which "serve[s] to justify appropriate delay." *Johnson*, 251 N.C. App. at 268, 795 S.E.2d at 132 (citation omitted). However, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." *Id.* at 267, 795 S.E.2d at 132 (citation omitted).

¶ 29 On the other hand, we will not fault the State for any delays attributable to the defendant. Indeed, "a defendant who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice." *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 655 (citation and internal quotation marks omitted). For example, delay caused by defense counsel's "scheduling conflicts[,]" by a defendant's waiver of appointed counsel and failure to retain counsel, and by a defendant's motions to remove counsel and appoint new counsel will not be attributed to the State. *Johnson*, 251 N.C. App. at 267, 795 S.E.2d at 131; *see also State v. Grooms*, 353 N.C. 50, 62–63, 540 S.E.2d 713, 721 (2000) ("[T]he record shows numerous causes for the delay, including the appointment of substitute defense counsel[.]"), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001); *Lee*, 218 N.C. App. at 53, 720 S.E.2d at 892–93 (declining to attribute delay to the State where the defendant had "filed numerous complaints with the State Bar concerning his appointed counsel").

¶ 30 In the instant case, Defendant had four attorneys before waiving counsel, proceeding *pro se*, and then seeking to have standby counsel reappointed to represent him at trial. Defendant received appointed

counsel to replace his public defender at some point prior to 2015, again in September of 2015, and again in August of 2016. Between September 2015 and August 2016, Mr. Carpenter—Defendant's third attorney—represented Defendant on an unrelated matter, for which Defendant received a 46- to 66-year sentence in May 2016. *See State v. Spinks*, 256 N.C. App. 596, 808 S.E.2d 350 (2017), *disc. review denied*, 370 N.C. 696, 811 S.E.2d 589 (2018).

¶ 31 In August 2016, Mr. Carpenter moved to withdraw as Defendant's counsel. The trial court granted the motion and appointed Mr. Wellman to represent Defendant. The instant case was calendared for trial in February of 2017. However, Mr. Wellman moved for a continuance in February 2017 because he was not yet ready to try the case. The following spring of 2018, the State's lead investigator faced serious health challenges that impeded the State's ability to proceed to trial. In October 2018, Defendant then sought to have Mr. Wellman removed as his attorney and to represent himself. Defendant's case came on for trial seven months later.

¶ 32 The record therefore shows that the vast majority of the delay was attributable to Defendant's actions with respect to his counsel, or to a good-faith delay on the part of the State resulting from the serious illness of the lead investigator. There is no indication that the delay in trial of his case was attributable to any negligence or willfulness by the State. Therefore, despite the unusual delay between Defendant's arrest and trial, this factor weighs against Defendant.

iii. Assertion of Right

¶ 33 "A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *Strickland*, 153 N.C. App. at 587, 570 S.E.2d at 903. A failure to assert the right, or a failure to assert the right early in the process, weighs against a defendant's contention that his right has been violated. *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722.

¶ 34 Here, despite being represented by counsel, Defendant filed three *pro se* motions asserting his right to a speedy trial: a motion for a speedy disposition in June 2016, a motion for speedy disposition in October 2016, and a motion for dismissal based on a violation of his right to a speedy trial in May 2017. These motions were filed "in violation of the rule that a defendant does not have the right to be represented by counsel and to also appear *pro se*." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256. After the Court permitted Mr. Wellman to withdraw and appointed him to represent Defendant as standby counsel, Defendant filed two *pro se*

motions for speedy trial: one in November 2018 and one in March 2019. Defendant's case came on for trial in May 2019.

¶ 35 Even considering both the improper motions filed when Defendant was represented by counsel and his *pro se* motions, and "[a]ssuming *arguendo* that [D]efendant properly asserted his rights through his *pro se* motion[s], this assertion of the right, by itself, did not entitle him to relief." *Id.*

iv. Prejudice

¶ 36 The defendant has the burden of proving the fourth factor: that he was prejudiced by the delay. *State v. Hammonds*, 141 N.C. App. 152, 163, 541 S.E.2d 166, 175 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002). "A defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. As our Supreme Court has explained,

> [t]he right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

State v. Webster, 337 N.C. 674, 680–81, 447 S.E.2d 349, 352 (1994) (emphasis and citation omitted) (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

¶ 37 Defendant asserts that the delay prejudiced him in two ways—he had not seen his daughter since he was arrested on these charges, and "it was hard to get in contact with the witnesses who were previously ready to testify"—specifically, his daughter and his cousin.

¶ 38 Defendant first cites *State v. Washington* in support of his argument that separation from his daughter "is a form of prejudice that we must consider." 192 N.C. App. 277, 292, 665 S.E.2d 799, 809 (2008). However, *Washington* is readily distinguishable from the case at hand. In *Washington*, the day after police arrested the defendant, police found his ten-year-old son alone in the home. *Id.* The child was placed in the care of another, and the defendant was separated from his child for over a year. *Id.* Here, however, Defendant has not provided any support for his contention that his separation from his daughter was comparable to the separation in *Washington*, or that the separation was due to the

pretrial delay at issue. Defendant has not suggested that his daughter was left unattended when he was arrested, or that he was unaware of her whereabouts during his incarceration. Further, unlike the defendant in *Washington*, Defendant was also incarcerated on other charges, for which he was convicted prior to trial in this case; the record shows that Defendant only received credit for two days spent in pretrial confinement. Thus, any inability to see his daughter prior to trial was not due to his pretrial incarceration on these charges.

¶ 39 Defendant also argues that the delay prejudiced his ability to present a defense because his witnesses were "hard to get up with." "If witnesses die or disappear during a delay, the prejudice is obvious." *Wilkerson*, 257 N.C. App. at 936, 810 S.E.2d at 396 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118). While the unavailability of a witness weighs in favor of a determination of prejudice, *id.* at 935, 810 S.E.2d at 395, where witnesses "were either available or could have been located with diligent effort at the time the case was called for trial[,]" our Courts have ultimately concluded that the defendant failed to meet his burden of establishing prejudice, *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

¶ 40 Here, Defendant contends that his daughter and his cousin had previously been willing to testify, but that "it's hard for us to get in contact with them now." Defendant did not, however, indicate to the trial court why he could not get in contact with his daughter, or that she was actually unavailable at trial. Similarly, he did not argue that his cousin, a truck driver, was actually unavailable, merely that he was "hard to get up with." The trial court, therefore, correctly concluded that this factor did not weigh in Defendant's favor without evidence that his witnesses were actually unavailable, or that Defendant had attempted to subpoena them for trial. Defendant has failed to show "actual, substantial prejudice." *Id.* This factor therefore weighs against Defendant's claim.

v. Weight of Factors

¶ 41 No one factor is determinative of a speedy-trial violation; "they must all be weighed and considered together[.]" *Wilkerson*, 257 N.C. App. at 929, 810 S.E.2d at 392. Here, where Defendant awaited trial for seven years, but most of the delay was attributable to Defendant and not the State, and where Defendant has failed to establish that the delay prejudiced his defense, we conclude that the trial court properly denied Defendant's speedy-trial motion. *See Carvalho*, 243 N.C. App. at 401–03, 777 S.E.2d at 84–85 (concluding that there was no speedy-trial violation, despite a pretrial delay of nearly nine years).

II. Motion for Mistrial

¶ 42 **[2]** Defendant next asserts that the trial court abused its discretion when it denied his motion for a mistrial due to alleged juror misconduct. We disagree.

A. Standard of Review

¶ 43 "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990) (citations omitted). "The decision to grant or deny a mistrial rests within the sound discretion of the trial court." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (citation and internal quotation marks omitted), *disc. review denied*, 368 N.C. 256, 771 S.E.2d 308 (2015).

B. Analysis

¶ 44 "When juror misconduct is alleged, it is the trial court's responsibility to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant." *Id.* (citation and internal quotation marks omitted). "Misconduct is determined by the facts and circumstances in each case, and this Court has held that not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial." *Id.* (citations and internal quotation marks omitted). "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct." *State v. Johnson*, 295 N.C. 227, 234, 244 S.E.2d 391, 396 (1978) (citation omitted). Because "[t]he trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings[,]" we accord great weight to the trial court's determinations regarding whether juror misconduct has occurred. *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001) (citation omitted), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).

¶ 45 In the case at bar, the trial court received a note from the jury foreperson stating that Juror Mercado "spoke to his mother during lunch. He

said 'he did not discuss the case' but he 'did get her opinion.' He did change his vote on count #2. He did say this openly." (Capitalization omitted). The trial court then questioned Juror Mercado regarding the alleged misconduct. *See State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (noting that the trial court has the "discretion to determine the procedure and scope of the inquiry"), *cert. denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). Juror Mercado informed the trial court that his conversation with his mother did not change his decision regarding the verdicts, that he based his decision only on the evidence presented at trial, and that he did not discuss the facts of the case with his mother or with anyone else. "[T]he trial court was ultimately satisfied that no prejudice resulted" from Juror Mercado's conversation with his mother. *Salentine*, 237 N.C. App. at 82, 763 S.E.2d at 805.

¶ 46 We therefore conclude that "[t]he trial court conducted a thorough inquiry into the circumstances in question and determined from the evidence before it that no juror had been improperly influenced. . . . [D]efendant has failed to show that the trial court abused its discretion by denying his . . . motion for a mistrial." *Bonney*, 329 N.C. at 74, 405 S.E.2d at 152.

III. Satellite-Based Monitoring

A. Imposition of Lifetime Satellite-Based Monitoring

¶ 47 **[3]** Defendant next contends that the trial court erred in imposing lifetime satellite-based monitoring. Defendant's satellite-based monitoring hearing was brief and uncontested:

> [PROSECUTOR]: And, Your Honor, as to the AOC-CR-615 form, he already has lifetime registration based on the conviction of rape. Nevertheless, I think we still need to make findings in this case. We would contend that Number 1 should be B, sexually violent offense; Number 2 should be he has not been classified as a sexually violent predator; Number 3 should be he is a recidivist as of this conviction; Number 4, the offense of conviction is not an aggravated offense; Number 5, the offense, A, did involve the physical, mental, or sexual abuse of a minor as to registration. Number 1, since the recidivist finding is appropriate, would be A, which is registration for his natural life, and Number 2, again, would be B again upon a finding of being recidivist, natural life is the appropriate registration.

THE COURT: [Defense counsel], do you wish to be heard?

[DEFENSE COUNSEL]: Actually, perhaps [the prosecutor] will just let me take a look at what he had checked off. I -- everything he said sounds exactly right. I just want to -- I don't have that form on me. I'm sorry.

[PROSECUTOR]: All right.

(Pause.)

[DEFENSE COUNSEL]: No objection, Your Honor.

THE COURT: All right. The Court, in hearing from the attorneys -- and this is under AOC-CR-615 form, Judicial Findings and Order For Sex Offenders, Active Punishment, Court does find under Paragraph 1(b), that this was a sexually violent offense under North Carolina General Statutes 14-208.6(5) or an attempt; that under Paragraph 2, the defendant has not been classified as a sexually violent predator; Number 3, defendant is a recidivist under 14-208.6(2b); Paragraph Number 4, the offense of conviction is not an aggravated offense; Paragraph Number 5, that it is -- did involve the mental, physical, sexual abuse of a minor child.

Under the order for registration, Court does order Paragraph 1(a), that he's ordered upon release from imprisonment to register -- register as a sex offender for the rest of his natural life. Under satellite-based monitoring, 2(b), that upon his release of imprisonment, [D]efendant shall enroll in satellite-based monitoring for the rest of his natural life unless the monitoring is terminated pursuant to 14-208.43.

That would be the order -- findings and the order with regard to AOC Form 615.

[PROSECUTOR]: Thank you, Your Honor.

[DEFENSE COUNSEL]: Your Honor, my client has instructed me to go ahead and enter a notice of appeal on the verdict, and we would request that the Appellate Defender be appointed.

¶ 48 As a preliminary matter, Defendant failed to properly appeal from the order imposing satellite-based monitoring. The satellite-based monitoring "statutes establish a civil regulatory regime[,]" *State v. Singleton*, 201 N.C. App. 620, 625, 689 S.E.2d 562, 565, *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010), and as such, a defendant seeking to appeal a satellite-based monitoring order must do so in accordance with Rule 3 of the North Carolina Rules of Appellate Procedure, which requires written notice of appeal. N.C. R. App. P. 3(a); *State v. Lopez*, 264 N.C. App. 496, 503–04, 826 S.E.2d 498, 503–04 (2019). Defendant did not file a written notice of appeal but has petitioned this Court to issue its writ of certiorari to review the satellite-based monitoring order.

¶ 49 A defendant's petition for writ of certiorari "must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). We conclude that Defendant has shown merit, and we allow Defendant's petition to review his claim.

¶ 50 Defendant contends that the trial court erred in imposing lifetime satellite-based monitoring because the State failed to meet its burden of proving that the imposition of lifetime satellite-based monitoring amounts to a reasonable search under the Fourth Amendment. Here, lifetime satellite-based monitoring was ordered without any argument or evidence regarding the reasonableness of the Fourth Amendment search effected by satellite-based monitoring.

¶ 51 At the hearing, however, Defendant made no argument, objection, or motion that satellite-based monitoring amounted to an unreasonable search. Accordingly, he requests that this Court exercise its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of his argument. In that we will not ordinarily consider a constitutional question not raised before the trial court, *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982), "Defendant cannot prevail on this issue without [our] invoking Rule 2, because his constitutional argument was waived." *Spinks*, 256 N.C. App. at 611, 808 S.E.2d at 360.

¶ 52 "In our discretion, we decline to invoke Rule 2 . . . to review Defendant's unpreserved argument on direct appeal." *Id.*; *see also State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (noting that because the defendant was "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest

injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step"), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018).

B. Ineffective Assistance of Counsel

¶ 53 **[4]** Defendant argues in the alternative that, if we decline to invoke Rule 2 to consider his appeal from the satellite-based monitoring order, we should conclude that he received ineffective assistance of counsel because his trial counsel failed to object to the imposition of lifetime satellite-based monitoring and failed to give proper written notice of appeal of the satellite-based monitoring order.

¶ 54 It is well settled that a constitutional claim of ineffective assistance of counsel is not available to defendants in this context because, as noted above, satellite-based monitoring proceedings are civil, not criminal, in nature. *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) (holding that ineffective assistance of counsel claims are not available in appeals from satellite-based monitoring proceedings), *aff'd per curiam*, 364 N.C. 422, 700 S.E.2d 222 (2010).

¶ 55 Defendant's argument that *Wagoner* "effectively overruled" prior precedent holding that ineffective assistance of counsel claims are available in appeals from satellite-based monitoring orders, and that we must instead follow the earlier precedent, is inapt. *See State v. Wooten*, 194 N.C. App. 524, 529–31, 669 S.E.2d 749, 752–53 (2008) (addressing merits of ineffective assistance of counsel claim from satellite-based monitoring order without considering whether the defendant was entitled to bring such a claim), *disc. review denied*, *cert. dismissed*, 363 N.C. 138, 676 S.E.2d 308 (2009).

¶ 56 Our Court first addressed the underlying question—whether a constitutional ineffective assistance of counsel claim is available to defendants in appeals from satellite-based monitoring orders at all—in *Wagoner*. Therefore, we must follow *Wagoner* as binding precedent, and dismiss Defendant's constitutional ineffective assistance of counsel claim. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). We note, too, that our Supreme Court affirmed *Wagoner* in a per curiam opinion, further underscoring its status as binding precedent. *See State v. Davis*, 198 N.C. App. 443, 447, 680 S.E.2d 239, 243 (2009) (The Court of Appeals' "responsibility is to follow established precedent set forth by our Supreme Court." (citation omitted)).

¶ 57 Nevertheless, Defendant also raises a claim that he received ineffective assistance of counsel under his *statutory* right to counsel, stemming from N.C. Gen. Stat. § 7A-451(a)(18) (2019) (providing that "[a]n indigent person is entitled to services of counsel" in "[a] proceeding involving placement into satellite monitoring"). Defendant presents an issue of first impression in our Court.

¶ 58 "Under North Carolina law, indigent[parties] are entitled to court-appointed counsel whenever they are involved in adversarial proceedings that jeopardize their liberty interests." *State v. Cummings*, 346 N.C. 291, 317, 488 S.E.2d 550, 566 (1997) (citing N.C. Gen. Stat. § 7A-451 (1996)), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Indeed, our appellate courts have previously held that the statutory right to counsel includes the right to *effective* counsel. *See In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020) (termination of parental rights proceedings); *In re C.W.N., Jr.*, 227 N.C. App. 63, 65, 742 S.E.2d 583, 585 (2013) (juvenile delinquency proceedings); *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996) (termination of parental rights proceedings); *In re Bishop*, 92 N.C. App. 662, 664–65, 375 S.E.2d 676, 678 (1989) (same).

¶ 59 In *Bishop*, we explained the reasons that the statutory right to counsel includes the right to effective counsel, together with a remedy for the violation of that right:

> The parents' right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute. A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation. If no remedy is provided for inadequate representation, the statutory right to counsel will become an "empty formality." Therefore, the right to counsel provided by [statute] includes the right to effective assistance of counsel.

92 N.C. App. at 664–65, 375 S.E.2d at 678 (citations omitted). Our Supreme Court cited this analysis with approval in its recent decision in *T.N.C.*, adding that "[c]ounsel necessarily must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless." 375 N.C. at 854, 851 S.E.2d at 32.

¶ 60 While our Courts have not extended this reasoning to counsel in satellite-based monitoring hearings, we see no reason—and the State

makes no argument—that we should not consider Defendant's statutory ineffective assistance of counsel claim. Indeed, our Supreme Court has noted that the imposition of satellite-based monitoring "constitutes a substantial intrusion into [defendants' Fourth Amendment] interests[.]" *State v. Grady* ("*Grady III*"), 372 N.C. 509, 544–45, 831 S.E.2d 542, 568 (2019). Thus, in accordance with our opinion in *Bishop*, we conclude that

> [b]y providing a statutory right to counsel in [satellite-based monitoring] proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation. If no remedy is provided for inadequate representation, the statutory right to counsel will become an "empty formality." Therefore, the right to counsel provided by [§ 7A-451(a)(18)] includes the right to effective assistance of counsel.

92 N.C. App. at 664–65, 375 S.E.2d at 678 (citations omitted).

¶ 61 We analyze statutory ineffective assistance of counsel claims under the two-prong standard established in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *T.N.C.*, 375 N.C. at 854, 851 S.E.2d at 33. Therefore, to assert a statutory ineffective assistance of counsel claim on appeal from the imposition of satellite-based monitoring, a defendant must show "that counsel's performance was deficient and that this deficiency was so serious as to deprive the party of a fair hearing." *Id.* at 856, 851 S.E.2d at 34 (2020). In determining whether counsel's performance was deficient, we accord great deference to matters of strategy, *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002), and we "evaluate the conduct from counsel's perspective at the time[,]" *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984)). To demonstrate prejudice, the defendant must establish "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

¶ 62 In the instant case, defense counsel did not object to the imposition of satellite-based monitoring, raise a constitutional argument regarding the imposition of satellite-based monitoring, or file written notice of appeal from the satellite-based monitoring order. We can discern no strategic reason for counsel to decline to object to or offer a constitu-

tional argument regarding the imposition of satellite-based monitoring in this case. Prior to Defendant's satellite-based monitoring hearing, our Court's precedent had already established that, in satellite-based monitoring proceedings, the State bears the burden of establishing that the imposition of satellite-based monitoring constitutes a reasonable search under the Fourth Amendment, and that the trial court must consider the totality of the circumstances before imposing satellite-based monitoring. *State v. Morris*, 246 N.C. App. 349, 352, 783 S.E.2d 528, 530 (2016); *State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016). Nor can we see a strategic reason for counsel to fail to properly file notice of appeal from the order.

¶ 63 Moreover, it is evident that counsel's deficient performance prejudiced Defendant. A trial court errs where it orders lifetime satellite-based monitoring without evidence that the enrollment constitutes a reasonable Fourth Amendment search. *Blue*, 246 N.C. App. at 265, 783 S.E.2d at 527.

¶ 64 In the instant case, had counsel lodged an objection regarding the reasonableness of satellite-based monitoring or appealed from the order imposing lifetime satellite-based monitoring, it is reasonably probable that the result of the proceeding would have been different. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 248; *see also State v. Tucker*, 266 N.C. App. 588, 589, 832 S.E.2d 258, 259 ("Simply put, after [*State v.*] *Griffin*, trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as 'empirical or statistical reports'—establishing that lifetime satellite-based monitoring prevents recidivism."), *remanded for reconsideration in light of Grady III*, 373 N.C. 251, 835 S.E.2d 442 (2019), *on remand at* 272 N.C. App. 223, 843 S.E.2d 486, 2020 N.C. App. LEXIS 491 (2020) (unpublished); *Spinks*, 256 N.C. App. at 610, 808 S.E.2d at 360 (noting that "[u]nder our precedents, if [the d]efendant had challenged the constitutionality of the [satellite-based monitoring] as applied to him, we would have been required to reverse the court's order of [satellite-based monitoring]" where the State offered no evidence and the trial court made no findings regarding the reasonableness of satellite-based monitoring).

¶ 65 Accordingly, we conclude that Defendant received statutory ineffective assistance of counsel with regard to the satellite-based monitoring hearing. We therefore reverse the satellite-based monitoring order and remand with instructions for the trial court to conduct a hearing on the reasonableness of the imposition of satellite-based monitoring.

Conclusion

¶ 66 For the foregoing reasons, we conclude that the trial court properly denied Defendant's motion to dismiss for an alleged speedy-trial violation, and that the trial court properly denied Defendant's motion for a mistrial. We therefore hold that Defendant received a fair trial, free from error.

¶ 67 However, because we hold that Defendant received ineffective assistance of counsel at the satellite-based monitoring hearing, we reverse the satellite-based monitoring order and remand for a hearing at which the trial court shall determine whether the imposition of satellite-based monitoring is reasonable as applied to Defendant.

NO ERROR IN PART; REVERSED IN PART AND REMANDED.

Judges DILLON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
MICHAEL DORTCH WASHINGTON

No. COA20-199

Filed 18 May 2021

1. Evidence—relevance—other crimes, wrongs, or acts—danger of unfair prejudice—plain error analysis

In a murder prosecution, where police found defendant carrying the revolver used during a home break-in to shoot a man, who was found dead a day after the revolver was stolen from another man during a similar break-in, the trial court did not commit plain error by admitting evidence of the earlier break-in. The evidence was relevant (Evidence Rule 401) to explaining how defendant obtained the murder weapon, and it was probative for reasons other than showing defendant's propensity to commit breaking and entering (Rule 404(b)) because it provided the factual context needed to "complete the story" of the murder. Finally, because Rule 403 determinations fall within a trial court's discretion, plain error review was unavailable to defendant's argument that the evidence was unduly prejudicial under Rule 403.

2. Appeal and Error—preservation of issues—failure to object to same or similar evidence—murder trial

In a murder prosecution, where defendant objected to testimony describing his suspicious behavior a few days after the murder but did not object to the admission of an audio tape of the witness's 911 call, which relayed the same facts included in the witness's testimony, defendant lost the benefit of his objection and, therefore, could not challenge the testimony on appeal.

3. Homicide—first-degree murder—during home break-in—jury instruction—doctrine of recent possession—plain error analysis

In a prosecution for first-degree murder and possession of a firearm by a felon, where police found defendant carrying the revolver used to shoot a man who was found dead a day after the revolver had been stolen during a home break-in, the trial court did not commit plain error by instructing the jury on the doctrine of recent possession. Even if the instruction could have caused the jury to improperly convict defendant of felony murder (based on a perception that defendant committed the break-in), the instruction did not have a probable impact on the jury's ultimate verdict because, in addition to finding defendant guilty of felony murder, the jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation.

Appeal by Defendant from judgments entered 22 May 2019 by Judge David A. Phillips in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State-Appellee.

Sean P. Vitrano for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Michael Dortch Washington appeals from the trial court's judgments entered upon his convictions for first-degree murder and possession of a firearm by a felon. Defendant contends that the trial court erred by admitting certain evidence and instructing the jury on the doctrine of recent possession. We discern no reversable error.

I. Background

¶ 2 Defendant was indicted on 16 December 2013 for the first-degree murder of Oren Reed and possession of a firearm by a felon. Defendant was initially tried in December 2016, but the case resulted in a mistrial after the jury deadlocked on both charges. Defendant's second trial began on 13 May 2019 and the evidence presented at Defendant's trial tended to show the following:

¶ 3 On 20 November 2013, Clinton Townsend received a call while he was at work that there had been a break-in at his home. When he arrived home, he discovered his side door had been kicked in and his door frame was broken. A pearl-handled .22 caliber revolver and a container of .22 caliber bullets were missing from a nightstand in his bedroom.

¶ 4 The next day, 21 November, Mary Nash stopped by her nephew Oren Reed's home to check on him. When she approached Reed's backdoor, she noticed that the door frame was splintered and saw glass and bullet shells on the ground. When she looked into the residence, she saw Reed laying in a pool of blood by the rear doorway and contacted law enforcement. He was pronounced dead at 5:07 p.m.

¶ 5 When law enforcement arrived at Reed's residence, they collected twenty-three spent shell casings from inside and outside the home, four projectiles left within bullet holes at the residence, and two live rounds. All casings appeared to be the same caliber and were marked with a "C" headstamp. Touch and blood swabs were collected from the interior and exterior of the broken door for DNA testing.

¶ 6 On the morning of 25 November, Jacqueline Randolph observed an unknown male individual walking up and down her driveway multiple times while looking around her property. She called 911 after he rang her doorbell but left when he saw that Randolph was home. Officer Robert Roberts responded to the call and saw an individual, later identified as Defendant, approximately half a mile from the Randolph residence who matched the description given in the 911 call.

¶ 7 Roberts attempted to speak with Defendant, who turned and ran before being apprehended by another officer. A firearm with a pearl handle, which was loaded with five live rounds and one spent cartridge in the cylinder, was recovered from Defendant. This firearm was identified by Townsend as the one stolen from his home on 20 November 2013. Defendant was carrying a backpack that contained jewelry, a hat, and 27 live rounds of ammunition bearing a "C" headstamp. Defendant was interviewed by Detective Matthew Hefner and a buccal swab was taken for DNA comparison and analysis.

¶ 8 Chief Medical Examiner Dr. Christopher Gulledge performed an autopsy on Reed. Dr. Gulledge determined that Reed was shot six times with the cause of death being a gunshot wound to the back. Dr. Gulledge also collected three bullets from Reed's body for further examination.

¶ 9 Firearms examiner Gene Rivera examined the firearm recovered on Defendant and compared it to the 23 spent cartridges recovered from Reed's residence. Rivera determined that 22 of the 23 cartridges found were fired by the firearm found on Defendant. Rivera reviewed three bullets and two fragments that were taken from Reed's body and determined that two of the bullets shared similar class and individual characteristics as bullets fired from the firearm found on Defendant. Rivera also examined the bullet fragments recovered from the crime scene and determined that all but two, which were too damaged to examine, had markings consistent with being fired from the firearm found on Defendant.

¶ 10 Eve Rossi, DNA team leader with the Charlotte-Mecklenburg Police Department, compared Defendant's DNA with DNA swabs taken from the trigger of the firearm and from the crime scene. Rossi determined that DNA found on the trigger of the firearm matched Defendant's DNA profile, and DNA found on the interior handle of Reed's side screen door and inside door was consistent with Defendant's DNA profile.

¶ 11 Defendant presented evidence and testified on his own behalf as follows: He met Reed through a friend named Demario on 19 November 2013 and the three of them stayed at Reed's house on the 20th. He purchased a firearm from Demario and shot it in Reed's backyard for fun. He was awakened on the 21st by an altercation between Reed and Demario and saw Demario grab the firearm and shoot Reed. Demario and Defendant fled from Reed's home and Demario gave the firearm back to Defendant. When he knocked on Randolph's door on 25 November 2013 he planned on kicking in the door and seeing what small valuables he could take.

¶ 12 Defendant called Sedrick Lockhart, a neighbor who lived across the street from Reed, as a witness. Lockhart testified that he saw Reed sweeping glass into a trashcan between 6:30 and 7:00 a.m. on 21 November 2013.

¶ 13 Ultimately, the jury found Defendant guilty of both offenses. The jury found Defendant guilty of first-degree murder, under both the theory of malice, premeditation, and deliberation and felony murder, and guilty of possession of a firearm by a felon. The trial court sentenced Defendant to life imprisonment without the possibility of parole for

his first-degree murder conviction and a consecutive sentence of 17-30 months for his possession of a firearm by a felon conviction. Defendant gave timely oral notice of his appeal.

II. Analysis

¶ 14 Defendant contends that the trial court: (1) committed plain error by admitting evidence of the break-in at the Townsend residence; (2) erred by admitting evidence of Defendant's behavior at the Randolph residence; and (3) committed plain error by instructing the jury on the doctrine of recent possession.

1. Townsend Evidence

¶ 15 **[1]** Defendant argues that the trial court committed plain error by admitting evidence of the Townsend residence break-in because this evidence was: (1) not relevant under Rule 401; (2) improper character evidence under Rule 404(b); and (3) unduly prejudicial under Rule 403. We disagree.

¶ 16 Defendant acknowledges his failure to object to the challenged testimony relating to the break-in at the Townsend residence but specifically and distinctly argues plain error on appeal. *See* N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial" which "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and citations omitted). A fundamental error is one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" *Id.* (quotation marks and citations omitted).

a. Rule 401

¶ 17 Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

¶ 18 Evidence of the Townsend break-in was relevant under Rule 401 because it tended to show how Defendant gained possession of the murder weapon. When a defendant denies involvement in a crime, as Defendant did at trial, "evidence tending to connect [the] accused with the crime" is

relevant circumstantial evidence. *State v. Whiteside*, 325 N.C. 389, 397, 393 S.E.2d 911, 915 (1989) (citation omitted). The jury determines the amount of weight to give this evidence. *Id.*

b. Rule 404(b)

¶ 19 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith[,]" but may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, [or] identity[.]" N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). "Rule 404(b) is a clear general rule of inclusion[,]" and evidence of other crimes, wrongs, or acts "is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quotation marks and citations omitted). Although the rule specifically lists purposes for which evidence of prior acts may be admitted, this list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted).

¶ 20 Evidence of other crimes, wrongs, or acts committed by a defendant may be admissible under Rule 404(b) if it "establishes the chain of circumstances or context of the charged crime." *White*, 340 N.C. at 284, 457 S.E.2d at 853. "Such evidence is admissible if the evidence . . . serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." *Id.* (citation omitted). Prior acts are also admissible if "there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quotation marks and citation omitted). These similarities need not "rise to the level of unique and bizarre." *Id.* (quotation marks and citation omitted).

¶ 21 Here, admission of evidence of the Townsend residence break-in was necessary for "the natural development of the facts and to complete the story of this murder for the jury[,]" and there were substantial similarities between the two incidents. *White*, 340 N.C. at 284, 457 S.E.2d at 853 (citation omitted). The Townsend residence was broken into through the side door when no vehicles were in the driveway and a revolver with a pearl handle was stolen. The next day, the Reed residence was broken into through the back door when no vehicles were in the driveway. The firearm stolen from the Townsend residence was used to murder Reed. Evidence of the Townsend break-in allowed the jury to understand how Defendant came to possess the murder weapon and how

long it had been outside the possession of its original lawful owner. This evidence also explained why the legal gun owner was not considered a suspect and showed the thoroughness of law enforcement's investigation. Accordingly, Rule 404(b) did not require its exclusion because it was probative for reasons other than Defendant's propensity to commit breaking and entering.

c. Rule 403

¶ 22 We decline review of whether Rule 403 barred the admission of evidence from the Townsend break-in because "the balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error 'to issues which fall within the realm of the trial court's discretion.' " *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000)).

¶ 23 Accordingly, the trial court did not err, much less commit plain error, by allowing the admission of evidence of the Townsend break-in.

2. Randolph Evidence

¶ 24 **[2]** Defendant next argues that the trial court erred by admitting Randolph's testimony describing Defendant's behavior on 25 November 2013 at Randolph's residence, because Defendant's actions at Randolph's residence were not sufficiently similar to the break-in at the Reed residence to establish either a motive for breaking into Reed's residence or his identity as Reed's killer.

¶ 25 Defendant contends that he preserved this issue by objecting to the introduction of Randolph's testimony at trial. A careful review of the record shows that, although Defendant objected to "questioning" regarding the events on 25 November 2013, he did not object to the admission into evidence of the audio tape of the 911 call made by Randolph or the transcript of that 911 call. The audio tape of the 911 call and the transcript included the relevant facts included in Randolph's testimony.

¶ 26 "It is well established that a criminal defendant loses the benefit of an objection when the same or similar evidence is later admitted without objection." *State v. Robinson*, 346 N.C. 586, 603, 488 S.E.2d 174, 185 (1997) (citation omitted). Accordingly, as "Defendant did not object to this testimony at trial and has not argued in his brief that admission of this evidence amounts to plain error. . . . we will not review this contention." *State v. Williams*, 363 N.C. 689, 703, 686 S.E.2d 493, 502 (2009) (citing N.C. R. App. P. 10(c)(4)).

3. Jury Instructions

¶ 27 **[3]** Defendant finally argues that the trial court committed plain error by instructing the jury on the doctrine of recent possession. Specifically, Defendant argues that the trial court erred by instructing the jury on the doctrine of recent possession because "it was not relevant to the issue of whether [Defendant] broke into Oren Reed's house and killed Reed[,]" and "likely caused the jury to convict [Defendant] of felony-murder based on its perception that he committed the break-in at the Townsend home."

¶ 28 Defendant acknowledges his failure to object to the challenged jury instruction at trial but specifically and distinctly argues plain error on appeal. *See* N.C. R. App. P. 10(a)(4). We thus review this issue to determine whether "a fundamental error occurred at trial" that "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). "[W]hen the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted).

¶ 29 The doctrine of recent possession allows the jury to infer that the possessor of recently stolen property stole the property. *State v. Joyner*, 301 N.C. 18, 28, 269 S.E.2d 125, 132 (1980); *see State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104 (2001). This inference is "to be considered by the jury merely as an evidentiary fact along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt." *State v. Barnes*, 345 N.C. 184, 241, 481 S.E.2d 44, 76 (1997) (quotation marks and citations omitted).

¶ 30 Presuming, *arguendo*, the trial court erred by instructing the jury that it could consider the doctrine of recent possession in deciding whether or not Defendant was guilty of first-degree murder, Defendant has failed to show that the challenged instruction had a probable impact on the jury's finding Defendant guilty of first-degree murder.

¶ 31 The jury found Defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and on the basis of felony murder. "Premeditation and deliberation is one theory by which one may be convicted of first-degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989) (citations omitted).

¶ 32 Defendant does not challenge his first-degree murder conviction based on malice, premeditation, and deliberation. Accordingly, even if the trial court's jury instruction on the doctrine of recent possession could have caused the jury to improperly convict Defendant of felony murder, the instruction did not have a probable impact on the jury's finding Defendant guilty of first-degree murder because the jury found Defendant guilty of first-degree murder based on malice, premeditation, and deliberation. *See State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996) ("Although the defendant should not have been convicted of felony murder, the verdict cannot be disturbed if the evidence supports a conviction based on premeditation and deliberation."); *State v. Cooper*, 219 N.C. App. 390, 394, 723 S.E.2d 780, 783 (2012) ("[E]ven if the trial court's jury instruction was in error and that error did change the jury's verdict as to the finding of deliberation, the error would still be harmless beyond a reasonable doubt because the jury's verdict was based on two separate, independent grounds."); *State v. Goode*, 197 N.C. App. 543, 553, 677 S.E.2d 507, 514 (2009) (discerning no plain error in defendant's conviction for first-degree murder because even if the trial court erred by instructing the jury on felony murder, "the jury found Defendant guilty of first degree murder under both theories[.]"); *State v. Mays*, 158 N.C. App. 563, 577, 582 S.E.2d 360, 369 (2003) ("Since defendant was found guilty of first degree murder based on both the theories of premeditation and deliberation and felony murder, any error in submitting the felony murder instruction was harmless."). Defendant's argument is without merit.

III. Conclusion

¶ 33 The trial court did not err by admitting evidence of the Townsend residence break-in. Defendant's challenge to the admission of evidence of his behavior at the Randolph residence was not preserved for appellate review. The trial court did not plainly err by instructing the jury on the doctrine of recent possession.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges TYSON and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 MAY 2021)

IN RE J.C. 2021-NCCOA-220 No. 20-345	Pitt (18JA130)	Affirmed in part; vacated and remanded in part.
MILES v. NANO-TEX, INC. 2021-NCCOA-221 No. 20-634	N.C. Industrial Commission (19-727832)	Reversed and Remanded
STATE v. BELL 2021-NCCOA-222 No. 19-953	Wake (16CRS214241)	No Error
STATE v. BROOK 2021-NCCOA-223 No. 20-463	Pasquotank (18CRS50020)	Affirmed
STATE v. CALLOWAY 2021-NCCOA-224 No. 20-312	Richmond (19CRS50658) (19CRS537)	No error in part; vacated and remanded in part.
STATE v. CHAUDOIN 2021-NCCOA-225 No. 20-340	Davie (17CRS52147-49)	Vacated in part and remanded.
STATE v. JUMPER 2021-NCCOA-226 No. 20-400	Rockingham (17CRS50277)	NO PREJUDICIAL ERROR.
STATE v. MORROW 2021-NCCOA-227 No. 20-679	Alamance (18CRS55495) (18CRS55496) (18CRS711420)	No Error
STATE v. RIVERA 2021-NCCOA-228 No. 20-381	Guilford (18CRS24202) (18CRS68585)	Appeal dismissed.
WAUGH v. STATES RES. CORP. 2021-NCCOA-229 No. 20-372	Rowan (19CVS139)	Dismissed
ZHANG v. PEARCE 2021-NCCOA-230 No. 20-770	Vance (19CVD1147)	Dismissed

CRAVEN COUNTY ON BEHALF OF JESSICA L. WOOTEN, PLAINTIFF
v.
ADEL HAGEB, DEFENDANT

No. COA20-442

Filed 1 June 2021

1. Child Custody and Support—child support—calculation of parent's income—sufficiency of findings—conclusory

In a child support case, where the trial court's conclusory findings of fact were insufficient to support appellate review of its calculation of the father's gross monthly income from self-employment, the case was remanded for further findings of fact.

2. Child Custody and Support—child support—credit for child living in home—sufficiency of findings

In a child support case, where the trial court failed to articulate its rationale for declining to give the father credit for a child living in his home, the case was remanded for further findings of fact to allow for appellate review.

Appeal by defendant from order entered 2 December 2019 by Judge Peter Mack, Jr., in Craven County District Court. Heard in the Court of Appeals 24 March 2021.

No brief filed on behalf of plaintiff-appellee.

McIlveen Family Law Firm, by Ashley Stucker, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Adel Hageb ("Father") appeals from an order requiring him to pay child support to Plaintiff Jessica L. Wooten ("Mother") for the support of their two minor children, A.H. and N.H.[1] After careful review, we remand to the trial court for the entry of additional findings of fact.

Background

¶ 2 Father and Mother were involved in a romantic relationship, but never married. On 23 February 2016, two months after A.H. was born,

1. Initials are used to protect the identities of the juveniles.

the Craven County Child Support Enforcement Agency ("CSEA") filed a complaint on Mother's behalf, as her designated representative under N.C. Gen. Stat. § 110-129(5) (2019), seeking child support from Father. Father filed his answer on 28 March 2016, in which he moved the court to order a paternity test. The resulting paternity test showed "a probability of 99.99% that [Father was] the biological father" of A.H. On 29 July 2016, the parties entered into a consent order obligating Father, *inter alia*, to provide health insurance coverage for A.H. and to pay Mother $1,000.00 per month in child support.

¶ 3 On 23 April 2018, eight months after N.H. was born, CSEA filed a complaint on Mother's behalf seeking child support for N.H., to which Father responded with his answer generally denying Mother's allegations. On 7 January 2019, based on "testimony and genetic test results showing 99.99% [probability that Father was] the father" of N.H., the trial court entered a child support transmittal order consolidating the two child support cases, obligating Father to provide health insurance coverage for N.H. as well as A.H., and ordering Father to contribute the sum of $2,554.00 per month to the support of N.H. and A.H., pending a final hearing.[2]

¶ 4 On 9 September 2019, the issue of permanent child support came on for hearing in Craven County District Court before the Honorable Peter Mack, Jr. At the hearing, Father testified that he has seven biological children, five of whom were then younger than 18, A.H. and N.H. included. Of his three other minor children, Father testified that two live with him, and the third lives with the child's mother in Yemen.

¶ 5 On 2 December 2019, the trial court entered its order obligating Father to contribute $2,605.22 per month toward the support of A.H. and N.H. In support of its child support determination, the trial court made the following findings of fact:

> 6. [Father] is presently under a Temporary Order of the Court dated 01/07/2019 requiring [Father] to pay the sum of $2,554.00 per MONTH for the support of his children; [N.H. and A.H.]
>
> 7. [Father] is self-employed and has a gross income of $19,454.39 per month.
>
> 8. [Mother] is self-employed and has [a] gross income of $1,800.00 per month.

2. The record on appeal does not contain a temporary child support order dated 7 January 2019; only the child support transmittal order is included in the record.

Handwritten next to finding of fact #7, the trial court added: "The Court reviewed tax returns provided by [Father]. Income from [Father]'s business for gaming and lottery was not included."

¶ 6 Following the court's ninth and final typed finding of fact, two additional findings were handwritten:

> 10. [Father] was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have [Father]'s name listed as the child's father.
>
> 11. [Father] shows significant personal expenses as business expense[s] on his tax returns.

The trial court did not attach a Child Support Guidelines Worksheet to the order.

¶ 7 Father timely filed his notice of appeal on 20 December 2019.

Discussion

¶ 8 On appeal, Father argues that the trial court erred by failing to make sufficient findings of fact concerning its calculation of his gross monthly income; by improperly calculating his gross monthly income; and by failing to give him credit for one of his biological children who resided in his home. In that the trial court's findings of fact are insufficient to support appellate review, we are precluded from addressing the merits of these arguments.

I. Standard of Review

¶ 9 "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Jonna v. Yaramada*, 273 N.C. App. 93, 100, 848 S.E.2d 33, 41 (2020) (citation omitted). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citation omitted).

¶ 10 However, determinations of gross income in a child support order are conclusions of law reviewed de novo, rather than findings of fact. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992). If the trial court labels a conclusion of law as a finding of fact, this Court still conducts de novo review. *Thomas v. Burgett*, 265 N.C. App. 364, 367, 852 S.E.2d 353, 356 (2019).

II. Findings of Fact

¶ 11 **[1]** Father argues that the trial court erred by failing to make findings of fact sufficient to support its calculation of his gross monthly income from self-employment. We agree.

¶ 12 "The calculation of child support is governed by North Carolina Child Support Guidelines established by the Conference of Chief District Court Judges." N.C. Child Support Servs., N.C. Dep't of Health & Human Servs., https://ncchildsupport.com/ecoa/cseGuideLines.htm (last visited May 12, 2021). "Failure to follow the [G]uidelines constitutes reversible error." *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992).

¶ 13 The Guidelines define "gross income" as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment . . . [or] ownership or operation of a business, partnership, or corporation[.]" N.C. Child Support Guidelines, at 3 (2019). The actual gross income derived from self-employment is calculated by subtracting the "ordinary and necessary expenses required for self-employment or business operation" from the gross receipts. *Id.*

¶ 14 When a trial court enters a child support order, it must "make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Johnston Cty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 440, 722 S.E.2d 512, 514 (2012) (citation omitted). "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence." *Plott*, 313 N.C. at 69, 326 S.E.2d at 867.

> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it[.]

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citation omitted). It is not for this Court to determine de novo "the weight and credibility to be given to evidence disclosed by the record on appeal." *Id.* at 712–13, 268 S.E.2d at 189.

¶ 15 Here, the trial court's findings of fact in its child support order are not sufficient to allow us to effectively review its calculation of Father's gross monthly self-employment income. The trial court's order includes two findings of fact that simply state the calculated gross monthly

incomes for each of the parents. The trial court also made one finding that states that the court "reviewed tax returns provided by" Father and that "[i]ncome from [Father]'s business for gaming and lottery was not included[,]" and another finding that Father "shows significant personal expenses as business expense[s] on his tax returns." These findings are more conclusory than explanatory; they offer us no basis for review of the trial court's application of the law to the evidence presented.

¶ 16 For example, Father argues that the trial court erred by failing to exercise its discretion in ruling on the deductibility of his straight-line depreciation as an ordinary and necessary business expense required for the operation of his business. This Court has repeatedly concluded that "under the Child Support Guidelines accelerated depreciation [is] not allowed as a deduction from a parent's business income." *Holland v. Holland*, 169 N.C. App. 564, 570, 610 S.E.2d 231, 236 (2005). However, we have also concluded that the trial court has "the discretion to deduct from a parent's monthly gross income the amount of straight[-]line depreciation allowed by the Internal Revenue Code." *Id.* at 570–71, 610 S.E.2d at 236 (citation omitted). Upon review of the trial court's order in this case, "we are unable to ascertain how the trial court treated depreciation. . . . Thus, the findings in this regard are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing Father's gross income, and remand is necessary." *Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181.

¶ 17 On remand, the trial court should compute Father's income in accordance with the Child Support Guidelines, and record its calculations in findings of fact consistent with this Court's rulings in *Holland* and *Lawrence*. *See Holland*, 169 N.C. App. at 571, 610 S.E.2d at 236. The findings of fact should address which, if any, of Father's ordinary and necessary expenses the trial court considered in calculating Father's gross income for child support purposes, as well as how it calculated his gross income based upon its consideration of the evidence presented. We note that "[t]he trial judge has the authority to believe all, any, or none" of the evidence and testimony presented when sitting as the finder of fact. *Sharp v. Sharp*, 116 N.C. App. 513, 530, 449 S.E.2d 39, 48, *disc. review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994). However, the trial court must specifically articulate the rationale for its findings and conclusions. *See Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

III. Credit for Biological Child

¶ 18 **[2]** Father also argues that the trial court erred, in calculating his child support obligation, by failing to credit him for his biological child who

lives in his home. In its child support order, the trial court stated that Father "was given credit for one biological child in his home as his name was listed as the father on the birth certificate. The other birth certificate provided did not have [Father]'s name listed as the child's father."

¶ 19 The Child Support Guidelines provide that "[a] parent's financial responsibility . . . for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is deducted from the parent's gross income." N.C. Child Support Guidelines, at 4. We note that evidence other than a parent's name on a child's birth certificate can be sufficient to establish parentage; for instance, this Court has vacated and remanded a child support order where the father "presented evidence that he has one daughter from his present marriage and that she lives in his household," concluding that "the trial court erred when it failed to take this into account in determining [the f]ather's gross income." *Kennedy v. Kennedy*, 107 N.C. App. 695, 702, 421 S.E.2d 795, 799 (1992).

¶ 20 In the instant case, it is apparent that the trial court took some of Father's evidence into account when it determined that he would receive credit for one child living in his home but not the other. At trial, Father testified that he is the biological father of the child for whom the trial court declined to give him credit. Of course, the trial court was free not to believe this testimony. *See Sharp*, 116 N.C. App. at 530, 449 S.E.2d at 48. However, the trial court did not articulate its rationale for declining to give Father credit for the second child living in his home. Accordingly, on remand, the trial court shall state in its findings of fact why it did not credit Father for one of the children residing in Father's home. If the trial court did not find Father's testimony to be credible, it should state so in its order. The trial court must articulate its rationale with sufficient specificity to facilitate effective appellate review. *Coble*, 300 N.C. at 714, 268 S.E.2d at 190.

Conclusion

¶ 21 For the foregoing reasons, we remand the child support order to the trial court for the entry of further findings of fact. "[O]n remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Holland*, 169 N.C. App. at 572, 610 S.E.2d at 237 (citation omitted).

REMANDED.

Judges DILLON and COLLINS concur.

IN RE K.M.

[277 N.C. App. 592, 2021-NCCOA-232]

IN THE MATTER OF K.M.

No. COA20-879

Filed 1 June 2021

1. Child Visitation—permanency planning order—suspension of in-person visits—closure of supervised visitation facility—temporary limitations

In a permanency planning matter, the trial court did not abuse its discretion by first granting respondent-mother supervised visitation with her two-year-old son, but then suspending in-person visitation—since the designated supervised visitation center was temporarily closed due to the COVID-19 pandemic—and instead granting virtual visitation by video. The unchallenged findings of fact established that respondent-mother's past violent behavior rendered it unsafe to allow visitation with untrained supervisors such as family members, and those findings supported the court's conclusion that the son's best interests would not be served by alternative forms of visitation.

2. Child Visitation—permanency planning—supervised visitation—assignment of cost—lack of findings

The trial court's permanency planning order was partially vacated where it did not include any findings assigning the cost of supervised visitation to the child's guardians despite the trial court making that pronouncement in court.

Appeal by respondent-mother from order entered 20 August 2020 by Judge Fred Wilkins in Alamance County District Court. Heard in the Court of Appeals 27 April 2021.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant mother.

ZACHARY, Judge.

IN RE K.M.

[277 N.C. App. 592, 2021-NCCOA-232]

¶ 1 Respondent-Mother appeals from the trial court's order awarding her supervised visitation with her son "Kenneth,"[1] but temporarily suspending in-person visitation due to the closure of the supervised visitation facilities during the COVID-19 pandemic. After careful review, we affirm the trial court's order in part, vacate the order in part, and remand.

Background

¶ 2 Kenneth was born to Respondent-Parents in February 2018. The day after Kenneth was born, the Alamance County Department of Social Services ("DSS") received a report that both Kenneth and Respondent-Mother had tested positive for marijuana. On 25 September 2018, DSS received a report concerning domestic violence between Respondent-Parents and the maternal grandmother; Respondent-Mother was arrested for allegedly assaulting her mother in Kenneth's presence. On 8 October 2018, DSS received another report, this time regarding substance abuse, improper supervision, improper care, and domestic violence. Respondent-Parents and the maternal grandmother allegedly consumed marijuana while Kenneth was present in the home, and when a social worker and law enforcement officers visited the home to investigate, Respondent-Mother locked herself in a bedroom with Kenneth and threatened to kill herself. When law enforcement officers intervened, Respondent-Mother "engaged in a physical altercation with them." Respondent-Mother was involuntarily committed, and Kenneth was placed in a kinship placement with a maternal relative.

¶ 3 On 12 October 2018, DSS filed a juvenile petition alleging that Kenneth was a neglected and dependent juvenile. That same day, the trial court entered an order placing Kenneth in nonsecure custody with DSS. DSS, in turn, placed Kenneth with a foster family ("the guardians"), rather than continuing the kinship placement, because the maternal relative stated that she could no longer care for Kenneth. Following a Child and Family Team meeting on 8 November 2018, Respondent-Parents agreed to case plans. And on 12 December 2018, Respondent-Parents stipulated to certain facts for the purposes of adjudication in this matter, including that "it would place [Kenneth] at a substantial risk of physical harm if returned to [Respondent-Parents] due to their ongoing mental health, substance abuse, domestic violence, lack of ability to provide basic needs and other issues of concern."

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1. Consistent with the parties' stipulation and the record on appeal, a pseudonym is used to protect the identity of the juvenile in accordance with N.C. R. App. P. 42(b).

¶ 4 On 30 December 2018, Respondent-Mother was arrested and charged with the misdemeanor simple assault of Respondent-Father. While incarcerated, she was charged with felony possession of a controlled substance on jail premises. She remained incarcerated until 24 January 2019.

¶ 5 On 6 January 2019, the trial court entered an order adjudicating Kenneth to be a neglected and dependent juvenile, and awarding custody of Kenneth to DSS. The trial court also set conditions for Kenneth's reunification with Respondent-Parents, and awarded Respondent-Parents supervised visitation.

¶ 6 Respondent-Father was arrested on 18 March 2019 for a variety of drug possession charges, contributing to the delinquency of a minor, and a probation violation. Respondent-Father was also charged with second-degree sexual exploitation of a minor and contributing to the delinquency of a minor, allegations concerning his 17-year-old girlfriend who lived with him. He was incarcerated until 22 June 2019, when he was released on post-release supervision and subject to house-arrest.

¶ 7 Following an initial permanency planning hearing on 9 April 2019, the trial court endorsed reunification with Respondent-Parents as a primary plan for Kenneth with adoption as a secondary plan, but maintained Kenneth's placement with DSS and continued Respondent-Parents' conditions for reunification.

¶ 8 On 15 May 2019, Respondent-Mother was arrested for a probation violation. On 18 July 2019, she was arrested for shoplifting and concealment of goods. Despite this, she consistently attended her supervised visits with Kenneth when she was not incarcerated.

¶ 9 On 6 August 2019, after Respondent-Mother failed to confirm that she would attend a visitation with the social worker, the social worker informed Respondent-Mother that the visitation would be canceled. Respondent-Mother texted the social worker an apology, but when she called the social worker, Respondent-Mother "began screaming obscenities at [the social worker,] calling her names such as stupid, fat, and bitch." The social worker ended the call as Respondent-Mother "continued to use profanity and was beyond reasoning with as she was screaming childlike into the phone." Respondent-Mother called back and after the social worker restated the confirmation process for supervised visitation, Respondent-Mother "again began shouting and screaming profanity, calling [the social worker] a f***ing idiot and a f***ing bitch."

¶ 10 Respondent-Mother was arrested again on 13 August 2019, for a variety of drug possession charges, and missed her next supervised visitation due to her being incarcerated. On 9 September 2019, Respondent-Mother was again arrested, this time for injury to personal property, and remained incarcerated until 13 January 2020.

¶ 11 In the four permanency planning orders filed between June 2019 and February 2020, the trial court repeatedly found that Respondent-Mother was "somewhat actively participating" in her case plan, but noted that she was "not making adequate progress within a reasonable period of time[.]" In the February 2020 order, the trial court found that Respondent-Father was making adequate progress and conditionally allowed him to have unsupervised visitation with Kenneth. However, after Respondent-Father tested positive for marijuana on 28 February 2020, the social worker was no longer able to say that his home was free of drugs, and Respondent-Father was reverted to supervised visitation only.

¶ 12 On 16 March 2020, the Chief Justice of the Supreme Court of North Carolina issued an order directing that the majority of district court cases, including this case, be continued for 30 days due to the emerging public health threat posed by the COVID-19 pandemic. The order was then extended to 1 June 2020, and hearings in this case were continued.

¶ 13 On 20 March 2020, the North Carolina Department of Health and Human Services directed the State's Child Protective Services units to "make all efforts to cease face-to-face visitation for foster children . . . and [to] transition to electronic means." Respondent-Parents agreed to suspend in-person visitation and engage in electronic visitation in the event that the county or state facilities went into lockdown due to the pandemic. Before the first scheduled visitation, Guilford County issued a stay-at-home order. Respondent-Parents began virtual visits with Kenneth on 28 March 2020. In-person visitation with Kenneth resumed on 21 May 2020 for Respondent-Mother and on 2 June 2020 for Respondent-Father.

¶ 14 The matter came on for hearing before the Honorable Fred Wilkins in Alamance County District Court on 22 and 23 July 2020. In an order entered 20 August 2020, the trial court ordered, *inter alia*, that Respondent-Mother exercise her visitation with Kenneth at a supervised visitation facility, but temporarily suspended that in-person visitation due to the closure of the supervised visitation facilities as a result of the COVID-19 pandemic:

> 6. That [Respondent-Mother] will have monthly visitation with [Kenneth] through the Family Abuse

> Services supervised visitation program or another supervised visitation program in the Triad that has similar cost structure and reasonable driving distance. The visitation shall be twice a month for two hours. [Respondent-Mother] will contact Family Abuse Services in order to set up an intake meeting or a different supervised visitation program in the Triad if Family Abuse Services remains closed that has similar cost structure and reasonable driving distance. The day and time will be based on the availability of the program. . . .
>
> . . . .
>
> 8. Until the Family Abuse Services supervised visitation center re-opens or another supervised visitation program is found, [Respondent-Mother]'s face-to-face visitation is suspended. [Respondent-Mother] is permitted to have a weekly video contact with [Kenneth] for fifteen to thirty minutes as [Kenneth]'s attention span will allow, supervised by the Guardians.

In the Family Abuse Services supervised visitation program order, the trial court added that Respondent-Mother's "level of supervision shall include eyes and ears on, direct supervision."

¶ 15 Although the trial court stated at the hearing that the guardians would bear the responsibility of paying the costs of supervised visitation, neither the permanency planning order, the guardianship short order, nor the Family Abuse Services supervised visitation program order—all entered on 20 August 2020—specifically addressed the assignment of the cost of the supervised visitation facility. On 18 September 2020, Respondent-Mother timely filed her notice of appeal from the permanency planning order.

Discussion

¶ 16 On appeal, Respondent-Mother argues that the trial court erred by (1) suspending her supervised visitation with Kenneth, and (2) failing to assign the cost of supervised visitation to the guardians. After careful review, we affirm that portion of the trial court's order temporarily suspending the supervised visitation. However, we vacate the portion of the order relating to payment of the supervised visitation facility fee, and remand to the trial court for clarification.

I. Standard of Review

¶ 17 Our review of a permanency planning order is "limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.S.*, 250 N.C. App. 370, 372, 792 S.E.2d 861, 863 (2016) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are thus binding on appeal. *In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909, *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

¶ 18 "We review a dispositional order only for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.K.*, 274 N.C. App. 5, 11, 851 S.E.2d 389, 394 (2020) (citation omitted).

II. Suspension of Supervised Visitation

¶ 19 **[1]** Respondent-Mother argues that the trial court erred when it suspended her supervised visitation with Kenneth, because that suspension "effectively eliminate[d] the very visitation the trial court ordered." Respondent-Mother further contends that "[t]he trial court's conclusion that it [wa]s contrary to Kenneth's best interest to have face-to-face visitation [wa]s not supported by the trial court's findings of fact or by competent evidence."

¶ 20 Our Juvenile Code provides:

> An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.

N.C. Gen. Stat. § 7B-905.1(a) (2019). When a trial court places a juvenile in a guardianship, "any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." *Id.* § 7B-905.1(c).

¶ 21 In the instant case, Respondent-Mother does not challenge any of the trial court's findings of fact. Instead, Respondent-Mother challenges

conclusion of law #19 and the decretal portions of the order that awarded her with, but then temporarily suspended, visitation at a supervised visitation facility. Respondent-Mother argues that "[t]he trial court erred when it suspended [her] visitation with her son, when she had not forfeited her rights to visitation, and when the evidence [did] not support a finding that it was contrary to Kenneth's best interest to have visitation with his mother."

¶ 22 Conclusion of law #19 reads as follows, with the specific portion that Respondent-Mother challenges in italics:

> 19. *That until Family Abuse Services supervised visitation center is operating or another supervised visitation facility in the Triad is operating that has similar cost structure and reasonable driving distance, it is contrary to the best interest of* [*Kenneth*] *to have face-to-face visitation with* [*Respondent-Mother*]. Until the centers re-open, [Respondent-Mother]'s face-to-face visitation is suspended. [Respondent-Mother] is permitted to have a weekly video contact with [Kenneth] for fifteen to thirty minutes as [Kenneth]'s attention span will allow, supervised by the Guardians.

¶ 23 The challenged conclusion of law—that face-to-face visitation with Respondent-Mother was not in Kenneth's best interests so long as no appropriate supervised visitation facility was open and operating during the COVID-19 pandemic—is necessarily understood in the full context of the trial court's order, and builds upon two independent determinations: (1) that only a specific, narrowly defined supervised visitation with Respondent-Mother would be in Kenneth's best interests; and (2) that the COVID-19 pandemic rendered that specific supervised visitation temporarily unavailable.

¶ 24 The trial court explained the first determination in the immediately preceding conclusions of law, which Respondent-Mother does not challenge:

> 17. That due to [Respondent-Mother]'s volatile and uncontrolled temper, inability to comply with the terms and conditions of court orders and other issues as outlined above, *it is contrary to the best interest of* [*Kenneth*], *inconsistent with the health and safety of* [*Kenneth*] *and would present a risk of harm to* [*Kenneth*]:

> *a. To have unsupervised visitation with* [*Kenneth*];
>
> *b. To have visitation supervised by* [*the maternal grandmother*];
>
> *c. To have visitation supervised by the [guardians]; and*
>
> *d. To have visitation supervised by anyone who is not trained in supervision techniques and strategies.*
>
> 18. That [Respondent-Mother] will have visitation supervised by Family Abuse Services supervised visitation center or another supervised visitation program in the Triad that has similar cost structure and reasonable driving distance.

(Emphasis added).

¶ 25 These unchallenged conclusions of law are supported by the trial court's unchallenged finding of fact "[t]hat it would present a risk of harm for the [guardians], maternal grandmother or any untrained person to supervise [Respondent-Mother]'s visitation due to [her] volatile and uncontrolled behaviors and her aversion to individuals who present information/direction contrary to [her] desire." Not only does Respondent-Mother not challenge this finding of fact, but our careful review of the record reveals significant support for the trial court's finding. In light of Respondent-Mother's criminal history and her pattern of abusive behavior and hostility toward her assigned social worker, it is apparent that the trial court plainly considered—and rejected—alternative forms of visitation and specifically concluded that Kenneth's best interests would be best served by limiting Respondent-Mother to visitation at a supervised visitation facility.

¶ 26 The second determination—that the COVID-19 pandemic rendered that narrowly defined supervised visitation temporarily unavailable—is supported by the trial court's unchallenged findings of fact. Among these binding findings of fact are several that address the effect of the COVID-19 pandemic on Respondent-Mother's visitation with Kenneth:

> 76. [Respondent-Mother] participated in her weekly visitation from January 14, 2020 — March 17, 2020. *All parties agreed to temporarily suspend face to face visits due to COVID*[-]*19*. These visits took place

at [DSS] or a mutually agreed upon location such as McDonald's. These visits went well. . . .

. . . .

102. *Due to the* [*COVID*]*-19 Pandemic, in an effort to protect the safety and health of the child in this case, a temporary and limited change to the visitation has been agreed to*. In this case, all parties agree to supervised visits on the weekend by the [guardians] at the same level of supervision. *In the event that all public locations close or the state/county goes into lockdown mode*, [*Respondent-Mother*] *and* [*Respondent-Father*] *agree to suspend their face-to-face contact and engage in electronic means*. These would be arranged by the parties. [Respondent-Parents] have been advised that they should also consult their attorneys in this matter. *Prior to the first supervised face-to-face visit by the* [*guardians*], *Guilford County issued a stay at home order*. [*Respondent-Parents*] *began virtual visits with [Kenneth] on March 28, 2020*.

103. The [guardians] reported that the virtual visits were a challenge. They were a challenge because it was sometimes difficult to get [Kenneth] to get on the phone as he is two and his attention span is not very long. The other challenge that they faced was when [Respondent-Parents] were not ready for the visits. For example, they would call [Respondent-Mother] and she would be asleep and would ask if she could get up and get it together and call them back. There were times that [Respondent-Father] would not answer and would call back an hour or so later. The [guardians] found that driving [Kenneth] around in the car while he spoke with [Respondent-Parents] was the best way to get him to focus on them.

104. The face-to-face visits began again on May 21, 2020 for [Respondent-Mother] and June 2, 2020 for [Respondent-Father]. The visits have gone well.

. . . .

121. Family Abuse Services of Alamance County operates a supervised visitation center *that is not*

> *currently operating and no date for re-opening has been set. . . .*
>
> . . . .
>
> 125. *That due to the pandemic, the visitation center is not currently conducting visitation and has not stated when it will reopen.*

(Emphases added).

¶ 27 These findings of fact not only support the trial court's conclusions, but also provide necessary context. The parties agreed to temporarily suspend face-to-face visitation at the onset of the pandemic. Indeed, these initial suspensions proved to be temporary, in that face-to-face visitation resumed after a few months. The limited and temporary nature of the suspension in the order before us is further reflected in the reasonable limitations that the trial court explicitly placed on the suspension: it would last only until the supervised visitation facility reopened, or until the parties located an open and adequate supervised visitation facility in the area.

¶ 28 With the supervised visitation facility temporarily closed due to the COVID-19 pandemic, the trial court was faced with determining whether it was in Kenneth's best interests either to temporarily suspend Respondent-Mother's supervised visitation, or to award Respondent-Mother an alternative form of visitation that the court had already determined was not in Kenneth's best interests. The trial court chose to grant Respondent-Mother the narrowly defined supervised visitation that would be in Kenneth's best interests, and then to *temporarily* suspend that supervised visitation until such visitation became available and safe.

¶ 29 Respondent-Mother cites *In re T.R.T.*, 225 N.C. App. 567, 572–75, 737 S.E.2d 823, 828–29 (2013), in support of her argument that the trial court's suspension of supervised visitation violated N.C. Gen. Stat. § 50-13.2(e), which provides, *inter alia*: "Electronic communication may not be used as a replacement or substitution for custody or visitation." In *T.R.T.*, this Court reversed and remanded a visitation order that provided the respondent-mother with Skype visitation, which we determined was "not visitation as contemplated by N.C. Gen. Stat. § 7B-905(c)[.]"[2]

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2. Our General Assembly repealed the relevant portion of § 7B-905(c) in 2013 and substantively recodified it as § 7B-905.1(a). 2013 N.C. Sess. Laws 305, 316, ch. 129, §§ 23–24.

225 N.C. App. at 573, 737 S.E.2d at 828. However, unlike the case before us, in *T.R.T.*, "the trial court did not make any specific findings that . . . visitation would be inappropriate under the circumstances." *Id.* at 574, 737 S.E.2d at 829. Here, the trial court *did* make specific findings that visitation would be inappropriate, with the sole exception of supervised visitation at Family Abuse Services, which was temporarily closed due to the COVID-19 pandemic.

¶ 30 Further, the trial court's temporary suspension of supervised visitation in this case does not amount to "a replacement or substitution for . . . visitation." N.C. Gen. Stat. § 50-13.2(e). Rather, the trial court exercised its statutory authority to "specify in the order conditions under which visitation may be suspended." *Id.* § 7B-905.1(a). Indeed, the trial court's order repeatedly describes Respondent-Mother's supervised visitation as "suspended," rather than "replaced" or "substituted" with weekly video contact.

¶ 31 The trial court appropriately provided Respondent-Mother with a contingency, depending on the availability of the specific form of supervised visitation that the court deemed to be in Kenneth's best interests. Having determined that other forms of visitation were not in Kenneth's best interests, and having determined that the sole form of appropriate visitation was temporarily unavailable, the trial court could have properly awarded Respondent-Mother with "no visitation" at all. *Id.* However, in its discretion, the trial court concluded that it was preferable to temporarily award Respondent-Mother weekly video contact for so long as in-person visitation was unavailable due to the pandemic.

¶ 32 The trial court's reasoning is further reflected in the transcript of the hearing. First, the trial court modified DSS's recommended visitation order, with respect to ensuring Respondent-Mother's sobriety:

> THE COURT: The Court's inclined to go along with the recommendations of the department in this matter, but I do think that the visitation schedule needs to be modified a little bit, particularly with respect to [Respondent-Mother].
>
> I don't think that the foster parents in the role of guardians should be put to the task each visit to determine her sobriety or her mental state on this, and from all the evidence that I have heard here over the last two days, it needs someone else that's more acutely attuned to making those types of decisions should do it.

> And I don't think it should be a matter of concern. I think it should be: if she appears under the influence of alcohol or mind-altering drug[s] or if she appears in an agitated state for the visitation, that the visitation is terminated, and I think that should be done by a third party, not by the guardians because, eventually, that is or will come back in court.
>
> . . . .
>
> So the visitation schedule is set by [DSS] on this will be modified on this to not include[ ] the terms "concern" but would be "appear at a visit."
>
> And those visits with respect to [Respondent-Mother]—I can't remember the name of the facility here.
>
> [COUNSEL FOR DSS]: Your Honor, the supervised visitation is done through the Family Abuse Services at the Family Justice Center. Right now, due to COVID[-19], they are not operating or conducting visits, and I don't know when they will start back.
>
> THE COURT: That's that way it needs to be done.

¶ 33 Then, after addressing assessment of the supervised visitation facility fee, Respondent-Mother's counsel objected to the visitation order. As described below, the trial court considered—and rejected—the alternative option of awarding Respondent-Mother supervised visitation at DSS:

> [RESPONDENT-MOTHER'S COUNSEL]: And, Your Honor, I would like to just put my objection on the record.
>
> THE COURT: I understand. I understand.
>
> [RESPONDENT-MOTHER'S COUNSEL]: That, number one, my client [lives] an hour away from Family Abuse Services, but Family Abuse Services has suspended all their supervised visitation. They do not have a plan of when they're going to start it back up, and it has not started back up, so it's not a viable option.
>
> THE COURT: Well, then—then the alternative is to have those visitations occur at DSS and be

> monitored by them, but *I don't want the guardians being placed in the position of having to deal with this lady under those conditions. I think that's—I think that's dangerous to all the parties and the child.*

(Emphasis added).

¶ 34 Respondent-Mother characterizes this exchange as a recognition by the trial court that there existed "an alternative to suspending visitation while FAS was closed[.]" That argument, however, ignores that the trial court clearly considered that option and nevertheless rejected it, determining that having Respondent-Mother's visitation supervised at DSS would not be "in the best interests of [Kenneth] consistent with [his] health and safety[.]" *Id.*

¶ 35 After careful review of the record, and due to the specific circumstances at the time, we cannot say that the trial court's decision was not supported by its findings of fact or conclusions of law, nor can we say that it was "so arbitrary that it could not have been the result of a reasoned decision." *N.K.*, 274 N.C. App. at 11, 851 S.E.2d at 394. The trial court's award and temporary suspension of Respondent-Mother's supervised visitation with Kenneth is affirmed.

III. Costs of Supervised Visitation

¶ 36 **[2]** Respondent-Mother next argues, and DSS and the guardian *ad litem* agree, that the trial court erred when it failed to order that the guardians be responsible for the supervised visitation facility fee, as the court indicated at the conclusion of the hearing.

¶ 37 In the trial court's written order, the court determined that it could not "find that [Respondent-Mother] has the ability to pay the fees associated with the center[,]" and that the guardians "have the ability to pay the fees associated with supervised visitation." However, although the trial court clearly indicated at the hearing that the guardians would bear the costs of the supervised visitation facility, the court failed to assign the costs in the order that it ultimately entered.

¶ 38 We have vacated and remanded permanency planning orders when "the trial court made no findings as to the costs associated with supervised visitation, who would bear the responsibility of paying such costs, or [the r]espondent's ability to pay the costs." *In re J.T.S.*, 268 N.C. App. 61, 74, 834 S.E.2d 637, 646 (2019); *accord In re Y.I.*, 262 N.C. App. 575, 582, 822 S.E.2d 501, 505–06 (2018).

¶ 39 Here, the trial court erred by failing to assign responsibility for the costs of supervised visitation in its order. Accordingly, "we vacate this portion of the order and remand to the trial court for clear instructions" with regard to the assessment of the supervised visitation costs. *J.T.S.*, 268 N.C. App. at 75, 834 S.E.2d at 647.

Conclusion

¶ 40 For the foregoing reasons, the trial court did not abuse its discretion in awarding, then temporarily suspending, Respondent-Mother's visitation at a supervised visitation facility that was temporarily closed due to the COVID-19 pandemic. However, the order is vacated and remanded for the entry of an order assigning responsibility for the costs of the supervised visitation.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
LANIER LAW GROUP, P.A., AND LISA LANIER, DEFENDANTS

No. COA19-926

Filed 1 June 2021

Insurance—duty to defend—policy exclusions—willful conduct—comparison of allegations and policy

Where a personal injury law firm was sued for violating federal law by knowingly using protected personal information for advertisements, the law firm's insurance company had no duty to defend the law firm because injury arising out of the willful violation of a penal statute was excluded from the applicable policy's coverage. Because the complaint in the federal lawsuit alleged that the injury was based upon the law firm's "knowing" conduct, and because "knowing" and "willful" mean essentially the same thing, the policy's exclusion for "willful" conduct was triggered.

Appeal by defendants from order entered 28 June 2019 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2021.

Goldberg Segalla LLP, by David L. Brown and Martha P. Brown, for plaintiff-appellee.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Matthew J. Millisor, for defendants-appellants.

TYSON, Judge.

¶ 1 Lanier Law Group, P.A. (LLG) and Lisa Lanier ("Lanier") ("collectively Defendants") appeal from an order entered granting summary judgment to North Carolina Farm Bureau Insurance Company, Inc. ("Plaintiff"). We affirm.

I. Background

¶ 2 LLG is a North Carolina-chartered professional association law firm, which specializes in representing plaintiffs in personal injury actions. Lanier is President/CEO of LLG and she practices law in North Carolina. Plaintiff is a mutual insurance company organized and existing under the laws of North Carolina.

¶ 3 LLG seeks clients by sending marketing materials to individuals who have been involved in automobile accidents. LLG obtains the names and addresses of the potential clients from the North Carolina Division of Motor Vehicles form DMV-349 accident reports.

¶ 4 LLG purchased three primary business policies and an excess policy from Plaintiff. Lanier individually purchased three homeowners' policies and a personal umbrella policy from Plaintiff.

¶ 5 LLG, Lanier, and other personal injury lawyers, who also utilize the direct mailing solicitations from DMV-349 accident reports, were named in a class action filed on 27 May 2016 in the United States District Court for the Middle District of North Carolina captioned *Garey v. James S. Farrin*, Case No. 1:16-cv-00542-LCB-JLW.

¶ 6 The plaintiffs in *Garey* alleged the defendants, including Defendants herein, obtained and used their "protected personal information" in connection with advertisements for legal services without the consent of the plaintiffs in violation of the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq*. ("DPPA").

¶ 7 Allegations in the *Garey* complaint assert:

> 140. Defendants *knowingly* obtained and used one or more Plaintiff's protected personal information from a motor vehicle record as described above.

> 141. Each Defendant *knowingly* obtained, disclosed and used one or more Plaintiff's protected personal information from a motor vehicle record for the purpose of marketing that Defendant's legal services.
>
> . . . .
>
> 143. When each Defendant sent its above-described mailing containing the words "This is an advertisement for legal services" to one or more Plaintiffs, Defendants *knowingly* disclosed and used said Plaintiff's personal information from a motor vehicle record.
>
> 144. Defendants *knowingly* obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record for the purpose of marketing legal services.
>
> 145. Advertising for legal services for the solicitations of new potential clients is not a permissible purpose for obtaining motor vehicle records under the DPPA. *Maracich v. Spears*, 133 S. Ct. 2191 (2013).
>
> 146. Defendants *knowingly* obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA. (emphasis supplied).

¶ 8 Upon cross motions for summary judgment in the underlying case, the United States District Court Judge denied the plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment. *Garey v. Farrin*, __ F. Supp.3d __, 2021 WL 231281 (M.D.N.C. 2021).

¶ 9 The *Garey* order and opinion states the plaintiffs were involved in vehicle accidents wherein "local police officers or North Carolina State Highway Patrol troopers investigated and recorded their findings on a standard DMV-349 form that was then provided to the North Carolina Division of Motor Vehicles ("DMV")." *Id.* at __, 2021 WL 231281, at *1. The information was gathered from the individual's driver's license. *Id.*

¶ 10 The defendants in *Garey* gathered the information from DMV -349s themselves or they "purchased accident report data aggregated by a third party." *Id.* Nowhere in plaintiff's pleadings or arguments in *Garey* did they allege the DMV-349 reports are "motor vehicle records," but "the information included in the report may be traced back to such records and thus fall under the ambit of the DPPA." *Id.*

¶ 11 "There are no allegations that the accident reports are motor vehicle records under the DPPA nor that the information was obtained from a search of a DMV database." *Id.* at __, 2021 WL 231281, at *8 (internal quotation marks omitted). The plaintiff in *Garey* did not assert and the District Court Judge did not find any case "where a defendant was adjudged liable as a matter of law for a DPPA violation after obtaining, disclosing, or using personal information that was not gathered directly from a state DMV." *Id.* (internal quotation marks omitted).

¶ 12 Lanier and LLG tendered the defense of the *Garey* litigation to Plaintiff under the policies listed above. Plaintiff agreed to defend Defendants under a reservation of rights to later deny indemnity coverage and to withdraw from providing for the defense. During oral argument, Plaintiff's counsel stated Plaintiff would not be seeking a recoupment of costs and fees extended during Defendant's defense of the *Garey* suit.

¶ 13 Plaintiff commenced this action by filing a declaratory judgment complaint on 2 December 2016 to determine its obligations under the above policies to the *Garey* suit. On cross-motions for summary judgment, the trial court entered a summary judgment order for Plaintiff on 28 June 2019 finding the *Garey* suit did not trigger Plaintiff's duty to defend under any of the tendered policies. Defendants timely appealed.

II. Jurisdiction

¶ 14 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 15 Defendants argue the trial court erred by granting summary judgment for Plaintiff and assert, at minimum, there is a duty to defend under the LLG excess policy.

IV. Plaintiff's Summary Judgment Motion

A. Standard of Review

¶ 16 North Carolina Rule of Civil Procedure 56(c) entitles a movant to obtain summary judgment upon demonstrating "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show there is "no genuine issue as to any material fact" and the movant is "entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

¶ 17 A genuine issue of material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty*

Mut. Ins. Co. v. Pennington, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

¶ 18 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). "This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and internal quotation marks omitted).

¶ 19 "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). When the court reviews the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted).

¶ 20 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). The meaning of the terms and provisions used in an insurance policy are a question of law. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

B. Rules of Construction of Insurance Policies

¶ 21 Our Supreme Court stated an insurance policy is a contract, "[a]s with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9, 692 S.E.2d 605, 612 (2010) (citation and internal quotation marks omitted); *see Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978) ("[T]he goal of [insurance policy] construction is to arrive at the intent of the parties when the policy was issued.").

¶ 22 "[T]he most fundamental rule [in interpreting insurance policies] is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994).

¶ 23 Any ambiguities in the insurance policy are "strictly construed against the insurer and in favor of the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73 (1986).

¶ 24 Our Supreme Court stated our courts are to "construe[] liberally insurance policy revisions that extend coverage so as to provide coverage, whenever possible by reasonable construction," and "strictly construe against an insurance company those provisions excluding coverage under an insurance policy." *Harleysville Mut. Ins. Co.*, 364 N.C. at 9-10, 692 S.E.2d at 612 (citation and internal quotation marks omitted); *see State Capital Ins. Co.*, 318 N.C. at 542-43, 350 S.E.2d at 71 (1986) ("Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured.").

¶ 25 If the insurance policy specifically defines a term, that definition governs its application. *York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 162, 155 S.E.2d 501, 505 (1967) ("Since the word . . . is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit."). This Court stated, "all parts of an insurance policy are to be construed harmoniously so as to give effect to each of the policy's provisions." *Nationwide Mut. Ins. Co.*, 115 N.C. App. at 198, 444 S.E.2d at 667.

C. Duty to Defend

¶ 26 A policyholder claiming coverage under an enforceable insurance policy triggers two independent duties the carrier owes to the insured: the duty to defend and the duty to indemnify. *See Harleysville Mut. Ins. Co.*, 364 N.C. at 6-7, 692 S.E.2d at 610-11. Our Court has held: "the insured has the burden of bringing itself within the insuring language of the policy." *Kubit v. MAG Mut. Ins. Co.*, 210 N.C. App. 273, 283, 708 S.E.2d 138, 147 (2011) (citation and alteration omitted).

¶ 27 If the insured party meets this burden, the burden shifts to the insurer to "prove that a policy exclusion excepts the particular injury from coverage." *Id.* (citation omitted). If the insurer meets this burden, the burden shifts back to the insured to "prov[e] that an exception to the exclusion exists and applies to restore coverage." *Home Indem. Co.*

v. Hoechst Celanese Corp., 128 N.C. App. 189, 202, 494 S.E.2d 774, 783 (1998) (citation omitted).

¶ 28 Our Supreme Court examined the interplay between a duty to defend and a duty to indemnify in *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) holding:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. *When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.* Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Id. (emphasis supplied). An insurer is excused from its duty to defend when "the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

¶ 29 Our Supreme Court further explained the duty of an insurer to defend in *Waste Management* holding: "Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage." *Id.* at 691, 340 S.E.2d at 377 (citation omitted).

¶ 30 Later in *Harleysville Mut. Ins. Co.*, our Supreme Court articulated a "comparison test" by reading the policies at issue and the complaint "side by side" to determine whether an insurer has a duty to defend. *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610. A court performs this test by taking "the facts as alleged in the complaint . . . are true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Id.* at 7, 692 S.E.2d at 611.

¶ 31 This Court extended the "comparison test" from just allegations in the pleadings and the policy in *Waste Management* and *Harleysville Mut. Ins. Co.* to include "facts learned from the insured and facts discov-

erable by reasonable investigation may also be considered." *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990).

¶ 32 Defendants tendered claims under four separate types of policies to Plaintiff: business primary policies, business excess policy, personal homeowners' policies, and a personal umbrella policy. The parties agreed at oral arguments that the only policy where coverage is at issue is under the LLG business excess policy. We limit our review to that policy.

D. Willful Violation of a Criminal Statute

¶ 33 The excess policy contains an exclusion for injuries arising out of the willful violation of a penal statute:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> a. "Personal injury" or "advertising injury";
>
> . . .
>
> (4) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

¶ 34 Plaintiff asserts that there is no duty to defend because the complaint alleges as the basis of liability, "Defendants knowingly obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA." Plaintiff contends a knowing violation of the DPPA is a criminal act and, the alleged injury arising out of a willful violation of a penal statute, triggers the policy exclusion. We agree.

¶ 35 Federal code, 18 U.S.C. § 2721, proscribes the knowing disclosure of personal information and highly restricted personal information. 18 U.S.C. § 2725(3) defines "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

¶ 36 18 U.S.C. § 2725(4) defines "highly restricted personal information" as an individual's photograph or image, social security number, medical or disability information[.]" 18 U.S.C. § 2725(4). 18 U.S.C. § 2723 crimi-

nalizes knowing violations. The code also creates a civil cause of action for knowing violations in 18 U.S.C. § 2724. Thus, a knowing violation of the DPPA, which gives rise to a civil cause of action, is also a violation of the penal criminal provision.

¶ 37 The dispositive issue is whether the plaintiff's allegations of "knowingly" violating the DPPA in *Garey* has the same meaning as "willfully" doing so. Neither the insurance policy nor the DPPA define "knowingly" or "willfully."

¶ 38 "Knowingly" is defined as "1. having knowledge or understanding 2. shrewd; clever 3. implying shrewd understanding or possession of a secret or inside information 4. deliberate; intentional." Webster's New World College Dictionary 806 (5th ed. 2014). "Willful" is defined in part as "1. said or done deliberately or intentionally." Webster's New World College Dictionary 1656 (5th ed. 2014).

¶ 39 The terms "knowingly" and "willfully" are both defined as deliberate or deliberately. The standard dictionary and ordinary meanings of both words are equivalent. Our General Assembly, our Supreme Court, and this Court have used both terms in tandem and interchangeably in both the criminal and civil contexts. *See Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); *State v. Tennant*, 141 N.C. App. 524, 529, 540 S.E.2d 807, 810 (2000).

¶ 40 We conclude that the words "willful" and "knowing" carry essentially the same or equivalent meanings. An allegation of a "knowing" violation of the DPPA is an allegation of a "willful" violation of the DPPA. The injury alleged in the underlying complaint, which is based upon Defendants having "knowingly obtained, disclosed and used Plaintiffs' personal information from a motor vehicle record in violation of the DPPA," is injury arising out of the "willful" violation of a penal statute and that violation is excluded from coverage under the plain terms of the policy.

V. Conclusion

¶ 41 Viewed in the light most favorable to Defendants and giving them the benefit of any disputed inferences, the trial court properly entered summary judgment for Plaintiff. Applying the "comparison test" of the *Garey* complaint's allegations to the terms of Defendants' policy with Plaintiff, the policy excludes coverage for the facts as alleged or for "facts discoverable by reasonable investigation." *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610-11 (citation omitted); *Duke Univ.*,

96 N.C. App. at 638, 386 S.E.2d at 764. Defendants' claims for coverage under the LLG excess business policy do not invoke Plaintiff's duty to defend. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges DEITZ and ARROWOOD concur.

HERMENA RICHARDSON, EMPLOYEE, PLAINTIFF
v.
GOODYEAR TIRE & RUBBER COMPANY, EMPLOYER,
LIBERTY MUTUAL INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA20-745

Filed 1 June 2021

Attorney Fees—workers' compensation—motion to compel medical treatment—reasonableness of motion

In a workers' compensation matter involving an employee with both work- and non-work-related injuries, there was sufficient evidence to show that defendants' motion to compel medical treatment pursuant to N.C.G.S. § 97-25(f)—seeking to have plaintiff undergo a functional capacity evaluation (FCE) after her treating physician could no longer explain why plaintiff continued to have issues with her shoulder even after extensive treatment—was reasonable, even though the motion was denied on the basis that the FCE did not constitute medical compensation or medical treatment under the statute. Therefore, the Commission did not abuse its discretion by denying plaintiff an award of attorney fees.

Appeal by plaintiff from opinion and award entered 18 August 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 May 2021.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, David P. Stewart, and Jay A. Gervasi, Jr., for plaintiff-appellant.

Young Moore and Henderson, P.A., by Jefferson P. Whisenant, for defendant-appellee.

TYSON, Judge.

¶ 1 Hermena Richardson ("Plaintiff") appeals from an Opinion and Award by the North Carolina Industrial Commission ("Commission") granting the Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company's ("Defendants") motion to add additional evidence, affirming the deputy commissioner's Opinion and Award, and denying the award of attorney's fees. We affirm.

I. Background

¶ 2 Plaintiff sustained compensable injuries in the course and scope of her employment to her bilateral shoulders on 21 October 2013. Plaintiff reached maximum medical improvement ("MMI") for her right shoulder injury and was given permanent restrictions in December 2014.

¶ 3 Plaintiff presented for a second evaluation by Dr. Brian Szura, who also found Plaintiff was at MMI for the right shoulder and assigned a 10% disability rating on 13 August 2015. The parties agreed Plaintiff was not disabled under the North Carolina Workers' Compensation Act. Plaintiff was already out of work for an unrelated knee condition, followed by her unrelated back condition. Dr. Christopher Barnes opined Plaintiff had reached MMI for her bilateral shoulder injury in January 2016.

¶ 4 On 10 August 2016, the Commission entered the Consent Order memorializing the parties' agreement. According to the Consent Order:

> Employee has . . . sustained no additional disability as a result of her compensable bilateral shoulder injury. Employee will not be entitled to indemnity benefits in the future *unless and until she is taken out of work totally for her bilateral shoulder condition by her authorized treating physician* or unless defendants are unable to accommodate bilateral shoulder work restrictions assigned by her authorized treating physician, in which case, Defendants have agreed to immediately reinstate temporary total disability benefits. (emphasis supplied).

¶ 5 The parties designated Dr. Peter Dalldorf as Plaintiff's authorized treating physician.

¶ 6 Two weeks after approval of the Consent Order, Dr. Dalldorf excused Plaintiff from work for two months on 29 August 2016 due to her left shoulder. Defendants re-instated temporary total disability compensation at the maximum compensation rate for 2013. This compensation continued to be paid at the time this appeal was filed.

¶ 7 Dr. Dalldorf opined Plaintiff had reached MMI for the left shoulder and assigned a 20% disability rating to the left arm and permanent work restrictions on 5 April 2017. Dr. Dalldorf noted the need to perform an isolated upper extremity functional capacity evaluation ("FCE") to determine Plaintiff's permanent restrictions. Plaintiff was unable to undergo the evaluation due to her unrelated back restrictions.

¶ 8 Plaintiff regularly visited Dr. Dalldorf to address her compensable shoulder injuries and attempted new treatments from October 2017 until October 2019. Defendants scheduled an independent medical examination with Dr. Marshall Kuremsky in November 2019. On 13 January 2020, Defendants asked Dr. Dalldorf to prescribe and order the previously indicated FCE for Plaintiff. Dr. Dalldorf responded he would not order an FCE. Plaintiff refused to participate in the FCE.

II. Procedural History

¶ 9 Defendants filed a motion to compel medical treatment before the Commission on 28 February 2020. They sought an order for Plaintiff to participate in an FCE pursuant to N.C. Gen. Stat. § 97-25 and 11 N.C. Admin. Code 23A.0609 of the Workers' Compensation Rules. Defendants argued, pursuant to N.C. Gen. Stat. § 97-25, they direct Plaintiff's medical treatment, and medical compensation is defined "as may reasonably be required to effect a cure or give relief and . . . will tend to lessen the period of disability" in accordance with N.C. Gen. Sta. § 97-2(19) (2019).

¶ 10 Special Deputy Commissioner Kimberly Fennell denied Defendants' motion. Defendants filed a motion to reconsider their motion to compel medical treatment. Defendants again cited "medical compensation" as the basis pursuant to N.C. Gen. Stat. § 97-25. Special Deputy Commissioner Fennell agreed to hear the motion and again denied Defendants' motion to compel medical treatment on 7 April 2020. Special Deputy Commissioner Fennell recommended the issue be raised before the Commission by requesting an appeal.

¶ 11 Defendant filed a Form 33: Request the Claim be Assigned for Hearing on 9 April 2020 in response to the special deputy commissioner's 7 April order. Defendants requested the scope of the hearing be limited to the legal issues raised in Defendants' motion to compel medical treatment. The parties submitted a pre-trial agreement and stipulations.

¶ 12 Issues before Deputy Commissioner Lori Gaines included: (1) whether an FCE qualifies as medical compensation as defined in N.C. Gen. Stat. §§ 97-2(19) and 97-25; (2) whether the FCE was wholly unnecessary; and (3) whether Defendants should pay attorney fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5) and 97-88.1.

¶ 13 Deputy Commissioner Gaines gave "great weight" to Dr. Dalldorf's revised opinion that an FCE was unsuitable. The commissioner found "Defendants acted unreasonably in waiting three years post MMI to request [an FCE]." Deputy Commissioner Gaines concluded: "[b]ased on the preponderance of evidence . . . [the FCE] at issue is not medical compensation because it does not effect a cure, provide relief or lessen the period of disability." The Opinion and Award was entered 10 June 2020 pursuant to N.C. Gen. Stat. § 97-25(f). The deputy commissioner awarded Plaintiff attorney's fees, "[a]s sanctions for Defendants' unreasonable engagement in stubborn, unfounded litigiousness of this claim."

¶ 14 Defendants filed a motion to reconsider the award of attorney's fees on 19 June 2020. Deputy Commissioner Gaines denied Defendants' motion to reconsider and ordered Defendants to pay Plaintiffs' attorney's fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5) and 97-88.1 in the amount of $11,075.00 for 44.3 hours worked defending Plaintiff's claims since February 2020. Defendants filed notice of appeal to the Full Commission along with a motion to admit additional evidence to present proof of Plaintiff's ongoing medical treatments.

¶ 15 The issues before the Full Commission included: (1) whether Defendant's motion to compel Plaintiff's FCE should be approved, and (2) whether Plaintiff is entitled to an award of attorney's fees pursuant to N.C. Gen. Stat. §§ 97-25(f)(5), 97-88.1.

¶ 16 The Commission found *inter alia*: (1) Defendants were made aware of Plaintiff reaching MMI for her left shoulder in March 2017; (2) Plaintiff received shoulder injections from October 2017 until August 2019; (3) Plaintiff indicated pain was no longer an issue on 10 August 2018; (4) Dr. Dalldorf ordered a diagnostic MRI for Plaintiff's right shoulder on 30 September 2019; (5) Dr. Dalldorf administered to Plaintiff additional injections and reviewed the MRI and noted he was "not really sure why [Plaintiff] is experiencing as much difficulty with her right shoulder as she is" on 14 October 2019; (6) Defendants scheduled an independent medical examination ("IME") two days later for 6 November 2019; and, (7) Dr. Kuremsky recommended the FCE at issue on 6 November 2019, which Dr. Dalldorf opined was not appropriate because it would not give the physician any information regarding Plaintiff's ability to return to work given the other injuries.

¶ 17 The Commission concluded, "[the FCE] in dispute in this matter is not reasonably necessary to effect a cure, provide relief, or lessen the period of disability as a result of Plaintiff's compensable injuries." The Commission further concluded "Defendants have not acted unreasonably by initiating the underlying medical motion pursuant to N.C. Gen.

Stat. § 97-25(f)" and denied an award of attorney's fees for Plaintiff. Plaintiff appeals.

III. Jurisdiction

¶ 18 An appeal lies with this Court from the Industrial Commission pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 97-86 (2019).

IV. Issue

¶ 19 Whether the Commission's findings of fact and conclusions of law are insufficient to support the decision not to award attorney's fees to Plaintiff when the Commission determined Defendants brought this action as an expedited medical motion pursuant to N.C. Gen. Stat. § 97-25(f), and the FCE at issue was determined not to constitute medical compensation under the act.

V. Standard of Review

¶ 20 Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. "This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted).

¶ 21 "The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason." *Bell v. Goodyear Tire & Rubber Co.*, 252 N.C. App. 268, 279, 798 S.E.2d 143, 151 (2017) (citation omitted). This Court reviews the Commission's conclusions of law *de novo*. *Id.* at 272, 798 S.E.2d at 147.

VI. Analysis

A. N.C. Gen. Stat. §§ 97-2(19) and 97-25(f)

¶ 22 The Workers' Compensation Act provides "a party may file a motion as set forth in this subsection regarding a request for medical compensation or a dispute involving medical issues." N.C. Gen. Stat. § 97-25(f). Defendants defended the request for a compelled FCE as medical compensation before Special Deputy Commissioner Fennell, Deputy Commissioner Gaines, and the Full Commission. On appeal, Defendants argue their medical motion is permissible under the statute as a "dispute involving medical issues" pursuant to N.C. Gen. Stat. § 97-25.

¶ 23 Defendants argued before the Commission a "dispute involving medical issues" is permitted by N.C. Gen. Stat. § 97-25(f). Defendants' asserted argument the FCE was a "dispute involving medical issues" is not properly before this Court. *See Setzer v. Boise Cascade Corp.*, 123 N.C. App. 441, 445, 473 S.E.2d 431, 433 (1996) (holding "we do not reach the substantive merits of defendants' arguments on appeal [because he did] not properly preserve for this Court's consideration under Rule 10. N.C. R. App. P. 10(b)(1)").

¶ 24 Whether the IME for the isolated upper extremity FCE would qualify as medical compensation under the statute is a question of law. Defendants did not cross-appeal the Commission's finding the FCE at issue is not medical compensation. This issue is not before this Court. We express no opinion on the merits, if any, of this issue.

B. Reasonableness of Defendants' Motion

¶ 25 N.C. Gen. Stat. § 97-25(f) provides guidance for the imposition of attorney's fees when a party acts unreasonably in filing a medical motion when a party: (1) is requesting medical compensation; or (2) there is a dispute involving medical issues. N.C. Gen. Stat. §§ 97-25(f) (2019).

¶ 26 Defendants argue the Commission correctly concluded they did not act unreasonably in filing the underlying expedited medical motion because they presented medical evidence that the FCE was reasonably required to determine Plaintiff's work restrictions as of 28 February 2020.

¶ 27 Plaintiff argues the FCE at issue does not constitute medical compensation or medical treatment and is not a proper subject of the truncated medical motion procedure set forth in N.C. Gen. Stat. § 97-25(f). Plaintiff asserts Defendants failed to request proper medical compensation under the statute.

¶ 28 Defendants clearly have the statutory right to direct Plaintiff's necessary medical treatment. N.C. Gen. Stat. § 97-25(c) (2019) ("the Industrial Commission may order necessary treatment"). Plaintiff had several concurrent injuries and conditions, some work related and some not. The parties stipulated in their Consent Order the bilateral shoulder injury was compensable, and as long as the treating physician excused Plaintiff from work for the shoulder injuries, Defendant would pay the medical costs related thereto.

¶ 29 Plaintiff's shoulder treatments were ongoing from October 2017 to October 2019. Defendants requested the FCE two days after Dr. Dalldorf had reviewed Plaintiff's MRI results. He could not determine why Plaintiff had continued to experience difficulties after treatments

for the work-related shoulder injury. Defendants assert it was imperative to ensure Plaintiff's bilateral shoulder injuries prevented her from work as support for their requested FCE. The MMI had been ordered and completed for both shoulders. Plaintiff had undergone injections, therapy, medications and claimed her pain was not an issue.

¶ 30 Defendants scheduled an IME two days after Dr. Dalldorf had reviewed Plaintiff's MRI for 6 November 2019. Dr. Kuremsky recommended the FCE at issue on 6 November 2019, which Dr. Dalldorf opined was not appropriate, even though he had agreed he could not substantiate Plaintiff's complaint related to her shoulders. The Commission properly found Defendants reasonably acted within their statutory rights after treatments and claims of lack of pain to determine the status of Plaintiff's compensable shoulder injury, which "will tend to lessen the period of disability," particularly if Dr. Dalldorf's FCE reservations were based upon or due to Plaintiff's non-employment related medical conditions. N.C. Gen. Stat. § 97-2(19).

C. Award of Attorney's Fees

¶ 31 Plaintiff contends Defendants' motion should retroactively be held not to be a request for medical compensation, and the Commission must award attorney's fees under N.C. Gen. Stat. § 97-25(f)(5) as a matter of law. We disagree and affirm the Commission's Opinion and Award on this issue.

¶ 32 This notion would require any unsuccessful medical motion, from any party, to result in an automatic award of attorney's fees as a matter of law, without the Commission exercising its discretion. "[S]uch liberality should not . . . extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' " *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 277, 293 S.E.2d 140, 143 (1982) (citations omitted).

¶ 33 An award of attorney's fees is only permissible under N.C. Gen. Stat. § 97-25(f)(5) when "the Commission determines that any party has acted unreasonably by initiating or objecting to a motion filed pursuant to this section." N.C. Gen. Stat § 97-25(f)(5). Plaintiff has failed to show the Commission abused its discretion, or that its findings are "manifestly unsupported by reason." *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151.

¶ 34 Defendants' initial motion to compel the FCE was asserted as medical compensation under N.C. Gen. Stat. § 97-2(19). Presuming without

deciding, the Commission properly concluded Defendants had misapplied the statute, the Commission also concluded Defendants' actions do not warrant imposition of Plaintiff's attorney's fees. That conclusion is not "manifestly unsupported by reason" under these facts. *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151.

¶ 35 Plaintiff was and is receiving ongoing disability compensation from Defendants. On 14 October 2019, Plaintiff's authorized treating physician, Dr. Dalldorf, could no longer explain her right shoulder complaints. Defendants sought a second opinion through an IME. Defendants inquired if Dr. Kuremsky would recommend an FCE to determine Plaintiff's work restrictions for her compensable bilateral shoulder injuries. Dr. Kuremsky noted "it would not be unreasonable to have an [FCE] . . . in order to have a specific set of restrictions or limitations . . . that would help in assigning any permanent restrictions" for Plaintiff.

¶ 36 An employee is only entitled to disability compensation if the employee is unable "because of injury to earn the wages which the employee was receiving at the time of injury." N.C. Gen. Stat. § 97-2(9). The parties' August 2016 Consent Order agreed Plaintiff would only be entitled to disability compensation if "she is taken out of work totally for her bilateral shoulder condition by her authorized treating physician or unless defendants are unable to accommodate bilateral shoulder work restrictions."

¶ 37 The motion to compel the FCE could determine Plaintiff's work restrictions and ability and her continued entitlement to disability compensation for that injury. The Commission concluded Defendant's motion was not "manifestly unsupported by reason" under these facts. *Bell*, 252 N.C. App. at 279, 798 S.E.2d at 151. If Plaintiff's unrelated medical conditions limits or prevents her from undergoing an FCE, that fact does not render Defendant's motion and assertions unreasonable.

¶ 38 Plaintiff argues the Commission failed to make appropriate findings of fact to support its conclusion of law that Defendants were not unreasonable in bringing this non-medical issue as a medical motion under the truncated expedited medical motion procedure under N.C. Gen. Stat. §§ 97-78(f)(2) and 97-25(f).

¶ 39 The Commission in its discretion properly concluded an award of attorney's fees was not allowed pursuant to N.C. Gen. Stat. § 97-25(f). Plaintiff is not entitled to attorney's fees. That portion of the Commission's Opinion and Award is affirmed.

D. N.C. Gen. Stat. § 97-88.1

¶ 40 Plaintiff abandoned her appeal regarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2019). An award of attorney's fees under this statute is not before us.

E. Frivolous Appeal

¶ 41 This Court has consistently held Rule 34 sanctions may be warranted, *inter alia*, if the appeal is not well grounded in fact, warranted by existing law, or taken for an improper purpose. *MacMillan v. MacMillan*, 239 N.C. App. 573, 771 S.E.2d 633 (2015).

¶ 42 Defendant argues Plaintiff has brought a frivolous appeal. Plaintiff's case was presented before Special Deputy Commissioner Fennell who denied and re-denied Defendants' motion to compel the FCE. Deputy Commissioner Gaines found the FCE was not medical compensation and determined the unreasonableness of the motion compelled Plaintiff's attorney's fees. The Commission agreed Defendants did not act unreasonably in attempting to confirm the degree and limits of Plaintiff's shoulder restrictions.

¶ 43 Plaintiff's argument was affirmed repeatedly before the Commission at three different levels. It can hardly be said that Plaintiff's appeal is not well grounded or taken for improper purpose before this Court. Defendants' assertion has no merit and is dismissed.

VII. Conclusion

¶ 44 The Commission found the FCE at issue was not medical compensation, Defendants did not cross-appeal that conclusion. We express no opinion on the merits, if any, of that issue. The Full Commission properly concluded Defendants' motion to compel the FCE was not unreasonable and, as such, did not abuse its discretion in concluding Plaintiff is not entitled to an award of attorney's fees.

¶ 45 Finally, Plaintiff's appeal is based on the statutory requirements is well grounded and is not frivolous. The Opinion and Award of the Commission is affirmed. *It is so ordered.*

AFFIRMED.

Judges HAMPSON and WOOD concur.

STATE v. GIBSON

[277 N.C. App. 623, 2021-NCCOA-235]

STATE OF NORTH CAROLINA
v.
DUSTIN CLAYBURN GIBSON

No. COA20-575

Filed 1 June 2021

Burglary and Unlawful Breaking or Entering—motor vehicle—containing any goods of value—sufficiency of evidence

Defendant's conviction for felony breaking or entering a motor vehicle was reversed where there was no evidence that the vehicle contained "goods, wares, freight, or other thing of value," an essential element required by N.C.G.S. § 14-56.

Appeal by Defendant from judgments entered 20 February 2020 by Judge Stanley Allen in Rockingham County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Dorian Woolaston, for the State-Appellee.

Mary McCullers Reece for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgments entered upon jury verdicts of guilty of various offences, including felony breaking or entering a motor vehicle, and a guilty plea to attaining habitual breaking and/or entering status. Defendant contends that the trial court erred by denying his motion to dismiss the charge of felony breaking or entering a motor vehicle because there was insufficient evidence to sustain a conviction.

I. Procedural Background

¶ 2 On 17 February 2020, a jury found Defendant guilty of various offenses, including felony breaking or entering a motor vehicle. Defendant pled guilty to attaining habitual breaking and/or entering status, while reserving his right to appeal the underlying convictions. The trial court found one mitigating factor and sentenced Defendant to consecutive prison terms of 26 to 44 months and 8 to 19 months, followed by 5 to 15 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 3 Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss the charge of felony breaking or entering a motor vehicle because the State failed to present sufficient evidence that the motor vehicle contained any "goods, wares, freight, or anything of value[,]" an essential element of the charge. We agree.

A. Standard of Review

¶ 4 We review de novo a trial court's denial of a motion to dismiss a criminal charge for insufficient evidence. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citation omitted). "In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense." *State v. Marshall*, 246 N.C. App. 149, 157, 784 S.E.2d 503, 508 (2016) (quotation marks and citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quotation marks and citation omitted).

¶ 5 The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). If "the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Winkler*, 368 N.C. at 575, 780 S.E.2d at 826 (quotation marks and citation omitted). "This is true even though the suspicion so aroused by the evidence is strong." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (citation omitted).

B. Analysis

¶ 6 N.C. Gen. Stat. § 14-56 provides, in pertinent part: "If any person with intent to commit any felony or larceny therein, breaks or enters any . . . motor vehicle . . . containing any goods, wares, freight, or other thing of value . . . that person is guilty of a Class I felony." N.C. Gen. Stat. § 14-56(a) (2020). Items of trivial value satisfy the element of "goods, wares, freight, or other thing of value." *See State v. McClaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987) (citing *State v. Goodman*, 71 N.C. App. 343, 349-50, 322 S.E. 2d 408, 413 (1984) (registration card, hubcap key); *State v. Quick*, 20 N.C. App. 589, 590-91, 202 S.E.2d 299, 300-01 (1974) (papers, cigarettes, shoe bag)). Where there is no evidence that the victim's vehicle contained a thing of even trivial value, a conviction

for felony breaking or entering a motor vehicle must be reversed. *State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424-25 (2011) (quotation marks and citation omitted) (testimony that nothing appeared to be missing from the vehicle and that defendant did not have time to take anything out of the truck "at best" only gave rise to a suspicion or conjecture that the truck contained things of value and was not sufficient to survive a motion to dismiss).

¶ 7 In this case, Defendant was charged with felony breaking or entering a pickup truck that was parked overnight at a business. The business owner, Jonathan Coleman, testified that the truck was an employee's personal vehicle that had been parked at the business overnight. Coleman testified that the "car window was busted open" and there was "[s]ome stuff scattered around in it." Deputy Zachary Fulp testified that the vehicle's window had been "busted out and went through." Detective Angela Webster assisted the investigation and took photographs of the crime scene. She testified that she "noticed a white Chevrolet truck that had the windows busted out of it."

¶ 8 The record is devoid of any evidence that the truck contained an item of even trivial value, and there was no evidence that anything had been taken from inside the truck.[1] While the testimony that there was "[s]ome stuff scattered around" the vehicle is evidence that things may have been in the vehicle – broken glass, for example – such testimony is not evidence that those things were even of a trivial value. The testimony, at best, merely gives rise to a suspicion that the truck contained items of value and is not sufficient evidence to survive a motion to dismiss. *See McDowell*, 217 N.C. App. at 634, 720 S.E.2d at 423.

¶ 9 The State argues that since evidence was presented that the vehicle was used by an employee on a regular basis, it can be reasonably inferred that the vehicle contained "items of value."

¶ 10 Although evidence that a vehicle is owned by a dealership is "strong circumstantial evidence that the car was in fact empty of all goods or wares of even the most trivial value[,]" *State v. Jackson*, 162 N.C. App. 695, 699, 592 S.E.2d 575, 578 (2004), evidence that a vehicle is owned

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1. The State also introduced and published photographs depicting the broken window of the motor vehicle, but they were not included in the record on appeal. The State was served with Defendant's proposed Record on Appeal and failed to object or propose an alternative record on appeal, so Defendant's "proposed record on appeal thereupon constitutes the record on appeal." N.C. R. App. P. 11(a). Our review is limited to "the record on appeal, the transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9[.]" N.C. R. App. P. 9(a).

and used by an individual is sufficient only to raise a suspicion or conjecture that the vehicle contained items of value and is not sufficient evidence that the vehicle contained items of value to survive a motion to dismiss. *State v. McLaughlin*, 321 N.C. 267, 271, 362 S.E.2d 280, 282 (1987) (reversing defendant's conviction for breaking and entering a motor vehicle for insufficient evidence despite evidence that the vehicle was owned by victim and parked outside her home). Accordingly, the State's argument lacks merit.

¶ 11 At trial, Defendant moved to dismiss all the charges, specifically including the charge of felony breaking or entering a motor vehicle. When asked by the trial court to respond to the motion, the State argued as follows:

> Your Honor, Mr. Coleman was able to pull out testimony that the vehicle was on his property. The vehicle was intact. No broken windows. There's photographic evidence that the window was broken and something happened, I mean, it's broken into.
>
> Reviewing of the video, you can see that suddenly the lights on the vehicle are coming on. There's an individual walking around the vehicle. Mr. Coleman was able to identify the owner of the vehicle as one of the employees.
>
> Your Honor, I believe there's sufficient evidence to meet all of the elements that a breaking occurred: a window was broken of a vehicle, we know who the property owner is, and it was on the property of Mr. Coleman. You can see the pictures in the video, it happened.

¶ 12 At that point, the trial court announced, "All right. I'll deny your motions in all of the charges at this point." The State did not even address the element of "goods, wares, freight, or other thing of value," much less argue that the evidence presented was sufficient to support that element.

¶ 13 A careful review of the record shows that the State presented insufficient evidence that the truck contained "goods, wares, freight, or other thing of value," an essential element of felony breaking or entering a motor vehicle. Defendant's conviction of that charge is reversed.

III. Conclusion

¶ 14 As there was insufficient evidence that the motor vehicle contained "goods, wares, freight, or other thing of value[,]" we reverse Defendant's conviction for felony breaking or entering a motor vehicle. Because the trial court consolidated Defendant's conviction for felony breaking or entering a motor vehicle with his conviction for injury to real property, we remand for resentencing as to the injury to real property conviction. *See State v. Fuller*, 196 N.C. App. 412, 426, 674 S.E.2d 824, 833 (2009).

REVERSED AND REMANDED.

Judges DIETZ and JACKSON concur.

STATE OF NORTH CAROLINA
v.
SHERRY LEE LANCE

No. COA20-273

Filed 1 June 2021

1. Arson—elements—dwelling house of another—co-conspirator

The State presented sufficient evidence for the jury to convict defendant of second-degree arson and conspiracy to commit second-degree arson where the "dwelling house of another" element was satisfied by evidence that defendant's mother lived in the rental home when the fire occurred. Even though the mother allegedly conspired with defendant to burn down the home, there was no evidence that she knew when or how the fire would be set, and thus there was a risk that she could have been in the home when it was burned.

2. Evidence—expert testimony—reliability test—detailed findings not required

In an arson prosecution, the trial court properly conducted the Evidence Rule 702 reliability analysis before exercising its discretion to admit the expert testimony of a fire investigator, where the court heard extensive voir dire testimony that covered all three prongs of the reliability test and announced that it had considered the three-prong test; it was not required to make detailed findings addressing each prong. Further, contrary to defendant's argument

that the expert used an admittedly unscientific "negative corpus" approach, the expert expressly stated that he did not rely on that approach.

3. Fraud—insurance fraud—jury instructions—specification of particular false statement

In an arson prosecution, the trial court did not commit plain error in its insurance fraud jury instructions when it failed to specify the particular false statement or misrepresentation alleged in the indictment. There was no variance between the indictment, the proof at trial, and the jury instructions.

4. Damages and Remedies—restitution—arson—sufficiency of evidence

The trial court erred in an arson prosecution by ordering defendant to pay a $40,000 restitution award to the homeowner without any testimony or documentary evidence to support the award amount.

Appeal by defendant from judgment entered 7 November 2019 by Judge Athena Fox Brooks in Henderson County Superior Court. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas J. Felling, for the State.

Warren D. Hynson for defendant.

DIETZ, Judge.

¶ 1 Defendant Sherry Lee Lance appeals her convictions for second degree arson, conspiracy to commit second degree arson, and insurance fraud, all stemming from allegations that Lance conspired with her mother to burn down the home they shared and collect insurance proceeds.

¶ 2 Lance's central argument is that the State could not prove an essential element of the arson charges—that Lance burned the dwelling house of another—because the only other inhabitant of the home was her mother, who allegedly conspired with her to burn the home.

¶ 3 As explained below, we reject this argument. The State's evidence showed that Lance's mother still lived in the home when the fire occurred, and there was no evidence that Lance's mother knew when or

how the fire would be set. Thus, the State's evidence was sufficient to send the case to the jury.

¶ 4 Lance also argues that the trial court erred by admitting the testimony of the State's fire investigation expert and committed plain error in the jury instruction concerning insurance fraud. We likewise reject these arguments and hold that the trial court properly considered the appropriate reliability factors before admitting the expert testimony and did not commit plain error in its jury instructions.

¶ 5 Finally, Lance alleges—and the State concedes—that there was insufficient evidence to support the trial court's award of restitution. We vacate the restitution order and remand that matter for further proceedings.

Facts and Procedural History

¶ 6 In September 2016, a house in Fletcher was destroyed by a fire. At the time of the fire, Defendant Sherry Lance and her mother Jonnie Turner lived in the house. They had leased it from the owner for about two years.

¶ 7 After the fire, Fletcher Police Sergeant Ronald Diaz, the town fire chief, the fire marshal, and an SBI agent went to the property to investigate. The SBI agent brought a canine trained to identify accelerants or incendiaries, but the canine did not alert to any.

¶ 8 There was a large hole in the kitchen floor area that the investigators believed was the origin point of the fire. Sergeant Diaz observed that there was an unusually low number of personal belongings in the home and "not what you would expect in a home that was just lost to a fire." Based on that observation, Sergeant Diaz contacted the National Insurance Crime Bureau to see if Lance had renter's insurance on her personal property in the home. Sergeant Diaz learned that Lance had obtained a renter's insurance policy in May 2016, about four months prior to the fire, and had filed a claim for items lost in the fire.

¶ 9 On 15 September 2016, Casey Silvers, a fire investigator hired by the insurance company to investigate the cause of the fire, went to the property to investigate along with a claims adjuster. The claims adjuster also met with Lance to take her recorded statement about the fire. In her recorded statement, Lance explained that she told the landlord about some electrical problems in the home but he would not fix them. Lance explained that she thought the fire was electrical. When asked where she was and what she did on the day of the fire, Lance stated that she had gone "dumpster diving" with her mother, taking their two dogs with

them. Lance submitted a "loss inventory list" to the adjuster, listing the items of personal property that she claimed were lost in the fire.

¶ 10 Several months later, Sergeant Diaz discovered that Turner had rented a storage unit in Fletcher the day before the fire. After obtaining a search warrant, Sergeant Diaz searched the unit and found a large number of personal belongings and household items, as well as personal financial and legal documents belonging to Lance. Various items that Sergeant Diaz found in the storage unit matched items listed on the loss inventory form Lance submitted to her insurance company. Sergeant Diaz obtained video footage from the storage facility, which showed Lance and Turner accessing the storage unit the day before the fire, moving items into the unit, and later moving items out of the unit after the fire.

¶ 11 The State charged Lance with second degree arson, conspiracy to commit second degree arson, and insurance fraud. The case went to trial.

¶ 12 At trial, the homeowner, the insurance adjuster, and Sergeant Diaz testified to the events described above. Along with Sergeant Diaz's testimony, the State presented the video footage from the storage facility and photographs of the items found inside the storage unit.

¶ 13 The State also offered the testimony of Casey Silvers as an expert in the field of fire and arson investigation. Lance objected on the ground that Silvers's expert testimony was not reliable under Rule 702. Both parties conducted *voir dire* questioning of Silvers. The trial court then ruled that Silvers's testimony was admissible "under the three prong reliability test" of Rule 702 and that it would allow Silvers to testify to his conclusion that the results of his investigation excluded possible causes of the fire "with the exception of an incendiary causation."

¶ 14 The State also presented evidence that Lance made incriminating statements to family members following the fire. Lance's stepdaughter testified that, in 2018, Lance made statements to her indicating that Lance was "in trouble for burning [her] house down." Lance's father testified that Lance came to live with him in 2017 and admitted that she set fire to her home in North Carolina, telling him that she set the fire to collect renter's insurance.

¶ 15 At the close of the evidence, Lance moved to dismiss the arson charges, arguing that the State failed to present sufficient evidence to show that the house was "the dwelling of another person" as required for arson because the only inhabitants of the house at the time of the fire were Lance and her alleged co-conspirator in the arson plan, and thus,

"this is a case where there was no risk to anybody else." The trial court denied the motion.

¶ 16 On 7 November 2019, the jury convicted Lance of all three charges. The trial court consolidated the charges and sentenced Lance to a term of 10 to 21 months in prison. The court also ordered Lance to pay $40,000 in restitution to the homeowner. Lance appealed.

Analysis

I. Denial of motion to dismiss

¶ 17 **[1]** Lance first argues that the trial court erred in denying her motion to dismiss the arson and conspiracy to commit arson charges because the State failed to present sufficient evidence that the house in question was inhabited by "another person," an essential element of those arson charges. Lance asserts that the only other inhabitant of the house, her mother Jonnie Turner, was her alleged co-conspirator in the arson plan. Thus, she argues, the house was not the dwelling of "another" because "neither co-conspirator would have been endangered by the hazards of a burning they allegedly planned together."

¶ 18 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The trial court must deny a motion to dismiss if the State presented "substantial evidence" of each essential element of the offense charged. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 19 Arson "is the wilful and malicious burning of the dwelling house of another person." *State v. White*, 288 N.C. 44, 50, 215 S.E.2d 557, 561 (1975). The essential elements of second-degree arson are: "(1) the wilful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is unoccupied at the time of the burning." *State v. Scott*, 150 N.C. App. 442, 453, 564 S.E.2d 285, 293 (2002). Our Supreme Court has held that the "arson requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the

same dwelling unit." *State v. Shaw*, 305 N.C. 327, 338, 289 S.E.2d 325, 331 (1982).

¶ 20 The central issue in this case is whether Lance's mother, Jonnie Turner, qualifies as "another" person under the elements described above. The parties acknowledge that our appellate courts have never directly addressed whether an alleged co-conspirator in a plan to commit arson can be considered another person for purposes of establishing the required elements of arson. We hold that under the facts of this case, there was sufficient evidence that the home was the dwelling of another.

¶ 21 First, the elements of this offense and our existing precedent do not provide any exception for co-conspirators, nor do they require that the other person living in the home be unaware or uninvolved in the plan to burn the home. For example, in *Shaw*, our Supreme Court held that the "requirement that the dwelling burned be that of 'another' is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling unit" without offering any exceptions for categories of persons who would not qualify as "another." 305 N.C. at 338, 289 S.E.2d at 331. Similarly, in *State v. Eubanks*, this Court emphasized that a house "is the dwelling house 'of another' if someone other than the defendant lives there." 83 N.C. App. 338, 339, 349 S.E.2d 884, 885 (1986). Again, the holding required only that "someone other than the defendant lives there." *Id.*

¶ 22 To be sure, these earlier cases involved homes that the defendant occupied together with others who were not involved in the arson plan. *See Shaw*, 305 N.C. at 328–29, 289 S.E.2d at 326–27; *Eubanks*, 83 N.C. App. at 339–40, 349 S.E.2d at 885. But we find nothing in these holdings that *required* those third parties to be innocent or uninvolved in the arson. *Shaw*, 305 N.C. at 337, 289 S.E.2d at 331; *Eubanks*, 83 N.C. App. at 339, 349 S.E.2d at 885. To the contrary, in *Eubanks*, the defendant warned the other inhabitant of the home to get out, take his belongings, and find another place to live in advance of the fire. 83 N.C. App. at 339–40, 349 S.E.2d at 885. Nevertheless, this Court found sufficient evidence of the essential elements of arson. *Id.* As these prior cases establish, the critical inquiry in determining whether a house "is the dwelling house 'of another' " is simply whether "someone other than the defendant lives there." *Id.* at 339, 349 S.E.2d at 885.

¶ 23 Lance cites to this Court's opinion in *State v. Ward*, where we held that the facts "precluded defendant's conviction of common law arson" based on facts showing the other inhabitant's "consent to, if not active participation in, a scheme with defendant to burn the [home]." 93 N.C.

App. 682, 686, 379 S.E.2d 251, 254 (1989). But our reasoning in that case was that the other inhabitant, with knowledge of the arson plan, "had permanently abandoned the [home] at the time of the burning" and was "living elsewhere at the time of the burning." *Id.* We held that "[u]nder these particular facts, there was no danger to anyone who 'might' have been in the [home] at the time it burned" because no one other than the defendant was currently living there. *Id.* at 686, 379 S.E.2d at 253.

¶ 24 In this case, by contrast, Lance's mother lived in the home at the time it was burned. Thus, unlike *Ward*, in this case there was a risk that Turner could have been in the home at the time it was burned, even assuming Turner participated in the plan to set the fire.

¶ 25 Moreover, an exception to this arson requirement for people who are aware of, or participate in, the plan to burn the dwelling is not consistent with the general purpose of criminalizing arson. When examining the scope of a criminal law, we consider "the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose." *State v. Wagoner*, 199 N.C. App. 321, 324, 683 S.E.2d 391, 395 (2009), *aff'd*, 364 N.C. 422, 700 S.E.2d 222 (2010). In explaining its holding in *Shaw*, the Supreme Court noted that "the main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned." 305 N.C. at 337, 289 S.E.2d at 331. In other words, the "gravamen of the offense of common law arson is the danger that results to persons who are or might be in the dwelling." *White*, 288 N.C. at 50, 215 S.E.2d at 561. Knowledge of, or participation in, a plan to commit arson does not remove the danger that the other person could be injured or killed when the burning occurs. Indeed, in this case, there is no evidence that Turner knew when the fire would be set, how it would be set, where in the house it would be set, or how much of the house would be destroyed. The evidence is solely that Turner assisted with other aspects of the conspiracy, such as leasing the storage unit the day before the fire and moving various items from the house into that unit. The State's evidence established that Turner was a person living in that dwelling who could have been in the home at the time it was burned, and that is all that is required to satisfy this element of the arson offenses in this case. Accordingly, we hold that the trial court did not err by denying Lance's motion to dismiss.

II. Admission of fire investigator's expert testimony

¶ 26 **[2]** Lance next argues that the trial court erred in admitting Casey Silvers's expert testimony because the court failed to conduct a proper

reliability analysis under Rule 702 of the Rules of Evidence and because Silvers's testimony was based on an unreliable method.

¶ 27 A trial court's ruling to admit expert testimony under Rule 702 "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). A trial court "may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* "Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 899, 787 S.E.2d at 15 (citation omitted).

¶ 28 Lance first asserts that the trial court "failed to conduct a proper analysis under Rule 702" because, despite "purporting to apply the three-part reliability test" in Rule 702, "the trial court's ruling shows that it only considered the first prong, but not the second or third." Thus, Lance argues, the trial court "failed to properly perform—and abdicated—its gatekeeping function, manifesting an abuse of discretion."

¶ 29 Under Rule 702, expert testimony must meet a three-pronged reliability test: (1) the testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case. N.C. R. Evid. 702(a)(1)–(3); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . it enjoys when it decides whether that expert's relevant testimony is reliable." *Id.* "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)." *Id.* at 892, 787 S.E.2d at 10.

¶ 30 Here, the trial court heard extensive *voir dire* testimony from Silvers. Silvers testified that he works as a senior fire investigator with a fire investigation firm, where he conducts origin and cause investigations for fires, using the scientific method to determine causation. Silvers stated that he has education and training in the field for more than 15 years and that he has completed various courses in fire investigation, expert testimony, and evidence collection through the National

Fire Academy. He attends yearly seminars and classes on investigations and is regularly tested on his knowledge. He testified that he is a certified fire investigator, teaches classes in arson detection, and has investigated over 800 fires. Silvers went on to describe his process of using the scientific method to investigate a fire by gathering data, analyzing the data, forming hypotheses on possible fire causes, attempting to disprove the hypotheses, and then attempting to confirm any remaining hypotheses. He testified that this method is recommended by the National Fire Protection Association's guidelines.

¶ 31 During questioning from Lance, Silvers testified that he is familiar with the term "negative corpus," which is a method that uses the elimination of accidental causes to conclude that a fire was caused by human agency, and that the negative corpus approach is not consistent with the scientific method. But Silvers clarified that he did not conclude that the fire in this case had an incendiary or human cause, only that he could not rule out the hypothesis of an incendiary cause based on the information gathered in his investigation. Silvers explained that his observations of the fire patterns and other evidence from the fire were indicative of an incendiary fire, which is why he could not exclude that hypothesis. Silvers testified that, even with negative test results for ignitable liquids, an incendiary cause could not be ruled out because there are incendiary sources that would not give a positive result.

¶ 32 Following this testimony, the trial court ruled that, "under the three prong reliability test," it would allow Silvers to testify about his conclusion that he had excluded other causes of the fire "with the exception of an incendiary causation" and that "he can say he excluded other things." The court noted, "I want it very clear that he just basically couldn't exclude that by his scientific means, not that means that's what happened."

¶ 33 In light of the trial record, the trial court's stated reasoning, and the court's express pronouncement that it considered the three reliability factors in Rule 702, we hold that the trial court's ruling was within the court's sound discretion. *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11. Silvers's extensive *voir dire* testimony covered all three prongs of the Rule 702 reliability test, describing in detail the facts and data he collected in conducting his investigation, the principles and methods he applied in accordance with his training and the guidelines for his profession, and the way he applied those principles and methods to the facts of this case to reach his conclusion that he could not exclude an incendiary cause. *See* N.C. R. Evid. 702(a)(1)–(3); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. The trial court was not required to make detailed findings addressing each prong of Rule 702. The court's statement that

it considered the three-prong analysis is sufficient to show that the trial court understood the applicable standard and exercised its discretion in choosing to admit the testimony under that standard. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9; *State v. Gray*, 259 N.C. App. 351, 355, 815 S.E.2d 736, 739–40 (2018). Accordingly, we reject Lance's claim that the trial court failed to engage in the appropriate Rule 702 analysis.

¶ 34 Lance also contends that the expert testimony should have been excluded because Silvers used a method, known as the negative corpus approach, that is unscientific and *per se* unreliable. Lance points to portions of the National Fire Protection Association's guidelines cautioning that "determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no supporting evidence of its existence, is referred to by some investigators as *negative corpus*." NFPA 921, ¶ 19.6.5 (2014 ed.). The guidelines explain that the negative corpus process "is not consistent with the scientific method, is inappropriate, and should not be used." *Id.*

¶ 35 But Silvers testified that he understood the negative corpus approach and its flaws and that he did not rely on negative corpus in reaching his conclusion about the cause of the fire in this case. Silvers testified that he applied the scientific method and process of elimination to rule out various hypotheses on the cause of the fire, in accordance with his profession's guidelines.

¶ 36 Again, the trial court was within its sound discretion to conclude that this testimony was admissible under Rule 702. "Rule 702 does not mandate particular procedural requirements, and its gatekeeping obligation was not intended to serve as a replacement for the adversary system." *Gray*, 259 N.C. App. at 355, 815 S.E.2d at 739–40 (citation omitted). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof continue as the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 355, 815 S.E.2d at 740. Here, there were appropriate means to challenge Silvers's testimony through contrary evidence and cross-examination—for example, by underscoring that Silvers's analysis did not establish causation.

¶ 37 Finally, even assuming the admission of this expert testimony was error—and we are not persuaded that it was—the error was harmless. This court may not order a new trial based on an evidentiary error unless the error was prejudicial, meaning "there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). Here, the State's evidence showed that Lance purchased an insurance policy shortly before the fire, that there was an unusually low number of personal belongings in the home at the time of the fire, and that Lance had moved many of her personal belongings from the house into a storage unit the day before the fire. Lance also admitted to two family members that she set the fire. In light of this evidence, Lance failed to show a reasonable possibility that, had the expert testimony been excluded, the jury would have reached a different verdict. Id. Accordingly, we find no error in the trial court's admission of the challenged expert testimony.

III. Challenge to jury instructions on insurance fraud

¶ 38 **[3]** Lance next contends that the trial court committed plain error in the jury instructions concerning insurance fraud. Lance argues that the court failed to specify the particular false statement or misrepresentation alleged in the indictment.

¶ 39 Lance concedes that she did not object to the instructions at trial and thus we review this issue solely for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 40 A defendant "must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Locklear*, 259 N.C. App. 374, 380, 816 S.E.2d 197, 202 (2018). With respect to the insurance fraud claim, this principle means that the trial court should "instruct the jury on the misrepresentation as alleged in the indictment." *Id.* at 383, 816 S.E.2d at 204. But a "jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." *Id.*

¶ 41 Here, there is no variance between the allegations in the indictment and the State's evidence at trial. The indictment alleged that Lance provided a false "written and oral statement" to her insurer in which she "claimed that her personal property was destroyed by an accidental

fire." The jury instruction required the jury to determine if Lance's statements about the insurance policy "contained false or misleading information concerning a fact or matter material to the claim," but it did not identify the particular statement alleged in the indictment.

¶ 42 The State's evidence showed that, following the fire, Lance met with an insurance adjuster to provide a recorded statement for her renter's insurance claim in which she told the adjuster she thought the fire was "electrical" and provided an inventory of personal property she claimed was destroyed in the fire. The State contended that these statements were false and that Lance set the fire.

¶ 43 The State did not present any evidence of other false statements Lance made to her insurer aside from those regarding the cause of the fire and the property that was destroyed. Lance asserts that there was evidence of "more than one statement by Ms. Lance the jury could interpret as false or misleading," but all of these statements concerned the alleged destruction of her property through a fire that Lance claims she did not cause. Viewed in context, these statements all fell within the scope of the specific misrepresentation alleged in the indictment that her property was destroyed by an accidental fire. Accordingly, we reject this argument and find no plain error in the trial court's instructions to the jury.

IV. Restitution award

¶ 44 **[4]** Finally, Lance argues that the trial court erred in ordering her to pay $40,000 in restitution without a sufficient evidentiary basis of testimony or documentary evidence to support the amount of restitution ordered. The State concedes error on this issue and we agree.

¶ 45 This Court reviews *de novo* the issue of whether a trial court's restitution order was supported by evidence at trial or sentencing. *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419 (2015). The amount of restitution set by the trial court must be supported by *evidence* at trial. *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). A "restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Id.* Likewise, an "unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004).

¶ 46 Here, the State informed the trial court that the owner of the house did "not wish to be here for sentencing," but that the State requested $40,000 in restitution. The State presented the trial court with a restitu-

tion worksheet requesting that amount, which the trial court then ordered. The State did not present any testimony or documents to support the requested $40,000 amount except for the worksheet. *See Moore*, 365 N.C. at 285, 715 S.E.2d at 849. We agree with the parties that the restitution award is not supported by sufficient evidence and therefore vacate and remand that portion of Lance's sentence for further proceedings.

Conclusion

¶ 47 For the reasons discussed above, we find no error in the trial court's judgment, but we vacate the trial court's award of restitution and remand for further proceedings on that issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges CARPENTER and WOOD concur.

STATE OF NORTH CAROLINA
v.
SHAWN MARTEZ McKOY

No. COA20-452

Filed 1 June 2021

1. Evidence—lay witness identification—surveillance footage—larceny—plain error analysis

In a prosecution for felony larceny, where the State introduced surveillance footage of a man stealing a trailer and where four lay witnesses identified that man as defendant, the trial court erred in admitting three of those identifications into evidence where only one witness was familiar with defendant based on previous dealings with him. However, the court's error did not amount to plain error because it did not have a probable impact on the jury's verdict where other evidence—including the one properly admitted identification, the surveillance footage (which was properly admitted for illustrative purposes), and still images from the footage—indicated defendant's guilt.

2. Larceny—felony larceny—elements—identity of perpetrator—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a felony larceny charge for insufficiency of the evidence, where—

rather than presenting evidence showing only that defendant had an opportunity to steal someone else's trailer—the State presented substantial evidence of each essential element of the crime and of defendant's identity as the perpetrator, including surveillance footage of a man hitching the trailer to his truck and driving away, witness testimony identifying defendant as the man in the footage, and still images placing defendant at the scene of the theft.

3. Damages and Remedies—restitution—felony larceny conviction—defendant's ability to pay

After a jury convicted defendant of felony larceny, the trial court did not abuse its discretion in ordering defendant to pay restitution, pursuant to N.C.G.S. § 15A-1340.36(a), where it properly considered defendant's ability to pay before doing so. The amount of restitution ordered and the terms of its payment reflected the court's reasonable consideration of defendant's financial circumstances, including that he was in prison for another crime (and, therefore, unable to earn a living), had two children to support upon his release, owned zero assets, and planned to go back to trade school once he left jail.

Appeal by Defendant from judgment and order entered 22 May 2019 by Judge Cy A. Grant, Sr., in Franklin County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers and Assistant Attorney General Eric R. Hunt, for the State-Appellee.

The Green Firm, PLLC, by Bonnie Keith Green, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant, Shawn Martez McKoy, appeals a judgment entered upon his conviction of felony larceny and an order for restitution. Defendant argues that the trial court: (1) plainly erred by permitting the State's four witnesses to offer lay opinions identifying an individual depicted in surveillance footage as Defendant; (2) erred by denying Defendant's motion to dismiss for insufficient evidence; and, (3) erred by failing to consider Defendant's ability to pay before ordering restitution. The trial court did not err in admitting one witness' identification of Defendant and did not plainly err in admitting identifications by the other witnesses. Because there was substantial evidence of each element of felony larceny and

Defendant's identity as the perpetrator, the trial court did not err in denying Defendant's motion to dismiss. The trial court did not fail to consider Defendant's ability to pay prior to ordering restitution, and therefore did not abuse its discretion.

I. Procedural History

¶ 2 On 20 February 2017, Defendant was indicted on two counts of felony larceny. Defendant was tried before a jury in Franklin County Superior Court on 21 and 22 May 2019. At the close of the State's evidence, Defendant moved to dismiss both charges for insufficient evidence. The trial court denied Defendant's motion. Defendant did not present any evidence and renewed his motion to dismiss, which the trial court again denied. The jury returned a verdict of guilty on the first count of felony larceny and not guilty on the second count. The trial court sentenced Defendant to 11 to 23 months in prison and ordered Defendant to pay $3,200 in restitution. Defendant gave timely notice of appeal in open court.

II. Factual Background

¶ 3 In August 2016, William Mitchell owned and operated a catering company in Louisburg, North Carolina, adjacent to a Sheetz gas station. Mitchell owned a trailer containing various catering equipment used for his business and stored the trailer on the business's property adjacent to the Sheetz. Mitchell testified that he purchased the trailer near the end of 2014 for "[s]omewhere in the vicinity of $3500."

¶ 4 Mitchell last saw the trailer around 1 August 2016. In the last week of August 2016, he drove past the property and saw that the trailer was gone. He contacted the Louisburg Police Department and Detective Clifford Stephens met with Mitchell at the property.

¶ 5 Stephens examined the lot where the trailer was kept and found no physical evidence other than tire drag marks over a curb. He then requested that Cindy Jackson, a manager at the Sheetz, permit him to access the surveillance footage recorded by the store's multiple cameras. Jackson allowed Stephens to review the footage, and Mitchell joined him. Stephens determined that the trailer was removed on the night of 25 August 2016 and asked Jackson to provide him with recordings taken from multiple cameras during a specific 15-minute time frame ("Sheetz Footage"). Jackson requested the Sheetz Footage from the Sheetz security office, which delivered a DVD containing it to Jackson. Jackson then provided the DVD to Stephens.

¶ 6 Both Mitchell and Stephens took still images of an individual depicted in the Sheetz Footage to show to their contacts. Stephens sent an image to Troy Wheeless, an agent with the North Carolina Department of Motor Vehicles license and theft bureau. Wheeless identified Defendant as the individual in the image. Mitchell also compared a picture of Defendant from a DMV website or other government database with the still that he took from the Sheetz Footage and concluded that Defendant was the individual in the Sheetz Footage.

¶ 7 Mitchell, Jackson, Stephens, and Wheeless each testified for the State at trial. During direct examination of Stephens, the State played multiple portions of the Sheetz Footage for the jury. Mitchell described the Sheetz Footage as showing, at approximately 9:00 p.m. on 25 August: (1) an extended-cab silver truck pulling in to the Sheetz parking lot and parking in front of the store; (2) an individual getting out of the driver's side of the truck and "hesitat[ing] as he appears to look over at the trailer"; (3) that individual, a "black male, average height, average weight, beard, mustache, close cut hair, a red shirt and khaki pants[,]" walking into the entryway of the Sheetz; (4) the individual walking through a hallway to the store's bathroom; (5) the individual returning to the truck, starting it, and beginning to drive off; (6) the truck leaving the Sheetz parking lot, and exiting the view of the cameras, in the direction of the property where the trailer was stored; and, (7) the truck later returning to the view of the cameras and pulling out with the trailer in tow. The video did not show anyone else getting into or out of the truck while it was on the Sheetz property.

¶ 8 At trial, Mitchell, Jackson, Stephens, and Wheeless each identified the individual depicted in the Sheetz Footage as Defendant. Defendant raised only a general objection to the identification by Jackson and did not object to the identifications by the other three witnesses.

¶ 9 The jury found Defendant guilty of larceny of the trailer, but not guilty of larceny of the catering equipment within the trailer. The trial court entered judgment and ordered restitution. Defendant appeals.

III. Discussion

A. Lay Witness Identifications

¶ 10 **[1]** Defendant argues that the trial court erred by permitting the State's witnesses to give lay opinion testimony identifying Defendant as the individual pictured in the Sheetz Footage.

¶ 11 Defendant acknowledges that he raised only a general objection to the identification by Jackson and did not object to the identifications by

Mitchell, Stephens, and Wheeless. As Defendant concedes, the issue of whether the identifications were properly admitted is not preserved for appellate review. See N.C. R. App. P. 10(a)(1) ("[I]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996) ("A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.").

¶ 12 Notwithstanding Defendant's failure to properly preserve this issue, because Defendant specifically and distinctly contends that the admission of the identifications amounted to plain error, we will review the trial court's admission of the identifications for plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

¶ 13 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). The plain error rule "is always to be applied cautiously and only in the exceptional case . . . ." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted).

¶ 14 "Under the North Carolina Rules of Evidence, the jury is charged with determining what inferences and conclusions are warranted by the evidence." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009) (citation omitted). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). A lay witness's "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019).

¶ 15 A lay witness may not give an opinion as to the identity of an individual depicted in surveillance images where the witness is "in no better

position than the jury to identify [the defendant] as the person in the surveillance [images] . . . ." *State v. Belk*, 201 N.C. App. 412, 414, 689 S.E.2d 439, 441 (2009). In determining whether a lay witness is sufficiently qualified to give an opinion on the identity of a person depicted in surveillance images, we consider (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's specific familiarity with the defendant's appearance at the time the surveillance was taken, or at a time when the defendant was dressed in a similar manner to the individual in the surveillance; (3) whether the defendant had disguised his appearance at the time of the offense; (4) whether the defendant had altered his appearance before trial; and (5) the clarity of the surveillance images and the completeness with which the individual was depicted. *State v. Hill*, 247 N.C. App. 342, 346, 785 S.E.2d 178, 181-82 (2016); *State v. Collins*, 216 N.C. App. 249, 256, 716 S.E.2d 255, 260 (2011).

¶ 16 At trial, only Wheeless indicated that he had a general familiarity with Defendant. Wheeless testified that he was "familiar with" Defendant, had "previous dealings" with Defendant, and had "been in his personal presence[,]" even though "[p]robably weeks" had passed between the last time Wheeless saw Defendant and the day he identified Defendant in the still image provided by Stephens. Mitchell, Jackson, and Stephens each had no familiarity with Defendant's appearance prior to seeing him in the Sheetz Footage. Mitchell testified that he did not know Defendant, nor did he have any contact with Defendant after the trailer was taken. Stephens testified that he had not seen Defendant in person prior to trial. Jackson offered no testimony indicating that she was familiar with Defendant.

¶ 17 None of the State's witnesses testified to their specific familiarity with Defendant's appearance at the time the trailer was taken, or with his appearance when dressed in a manner similar to the individual depicted in the Sheetz Footage. No evidence was presented that the individual in the Sheetz Footage had used a disguise, or that Defendant had altered his appearance between 25 August 2016 and trial. Finally, there is no indication of any defect in the clarity of the Sheetz Footage, and there are multiple instances in which the footage shows the individual in his entirety as he walks through the view of the store's cameras.

¶ 18 The admissibility of Wheeless's testimony is controlled by this Court's decision in *State v. Collins*. In that case, the defendant argued that the trial court plainly erred by admitting an officer's lay opinion identifying the defendant as the person depicted in a surveillance video. *Collins*, 216 N.C. App. at 254, 716 S.E.2d at 259. The officer testified only

that he "had had dealings" with the defendant. *Id.* at 256, 716 S.E.2d at 261. This Court stated that "[w]e believe 'dealings' mean more than minimal contacts . . . however, we do note defense counsel could have questioned these 'dealings,' if so desired." *Id.* at 257, 716 S.E.2d at 261. Based on the officer's testimony concerning "dealings" with the defendant, this Court concluded that the officer "was familiar with defendant and would be in a better position than the jury to identify defendant in the videotape." *Id.*

¶ 19 Similarly, Wheeless testified that he had "previous dealings" with Defendant. Wheeless also testified that he was "familiar with" Defendant and had "been in his personal presence[.]" Defendant did not question the basis of Wheeless's claimed familiarity or the scope of these "dealings" on cross examination. Accordingly, Wheeless was qualified to give lay opinion testimony identifying the individual in the Sheetz Footage as Defendant. The admission of Wheeless's testimony was not error, let alone plain error.

¶ 20 No evidence, however, supported a conclusion that Mitchell, Jackson, or Stephens were qualified to provide lay opinion testimony identifying Defendant as the individual in the Sheetz Footage. The trial court erred by admitting their identifications of Defendant.

¶ 21 Defendant contends that but for these erroneous identifications, "there was no evidence that [Defendant] committed the crime or was at the Sheetz store, and the jury likely would not have convicted him." We disagree.

¶ 22 Defendant emphasizes that the trial court "instructed the jury that the video and screen shots were admitted only for the purpose of illustrating and explaining the witnesses' testimony." The DVD containing the Sheetz Footage was admitted "generally into evidence" by the trial court. The trial court instructed the jury, however, that "[p]hotographs and a video were introduced into evidence in this case for the purpose [of] illustrating and explaining the testimony of a witness. These photographs and video may not be considered by you for any other purpose." Nonetheless, as discussed above, Wheeless's identification of Defendant was based on his prior familiarity with Defendant and was properly admitted. The jury was permitted to consider the Sheetz Footage as illustrative of Wheeless's identification and assess the accuracy of Wheeless's identification.

¶ 23 Additionally, the State introduced several still images for the jury's consideration. Among these were State's Exhibit 5, "a picture of a gentlemen [sic] at the men's and women's restroom," and State's Exhibit 7, a

known photograph of Defendant in 2014 taken from a DMV or other government database. During examination of both Stephens and Wheeless, State's Exhibit 5 and State's Exhibit 7 were published to the jury simultaneously. The jurors therefore had an opportunity to compare the images and draw their own conclusion as to whether Defendant was the individual in the Sheetz.

¶ 24 Because the admission of Wheeless's identification was not erroneous, the Sheetz Footage illustrated Wheeless's identification and permitted the jury to assess its accuracy, and the jury had the opportunity to draw its own conclusions based on still images admitted into evidence, we cannot conclude that the erroneous admission of identifications by Mitchell, Stephens, and Jackson "had a probable impact on the jury's finding that the [D]efendant was guilty." *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Consequently, Defendant cannot demonstrate prejudice, and the erroneous admission of these identifications did not amount to plain error.

B. Sufficiency of the Evidence

¶ 25 **[2]** Defendant next argues that the trial court erred by denying his motion to dismiss because the evidence was insufficient to support his conviction for felony larceny. We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted).

> In deciding whether substantial evidence exists[, t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

¶ 26 Defendant was convicted of felony larceny of the trailer under N.C. Gen. Stat. § 14-72(a). "The essential elements of larceny are that the defendant '(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently.' " *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (quoting *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993)). "Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2016).

¶ 27 Defendant argues that the evidence admitted at trial "established only that [Defendant] was in the Sheetz store" and that "[t]here was insufficient evidence to support an inference that the individual depicted in the Sheetz surveillance video is the person who stole the trailer." We disagree.

¶ 28 During the State's case in chief, the trial court admitted the Sheetz Footage into evidence, and the State played multiple clips of the footage.[1] Mitchell and Stephens extensively narrated the contents of these clips without objection. As discussed above, each of the State's witnesses identified Defendant as the individual in the Sheetz Footage. Though three of these identifications were erroneously admitted, they are still relevant in assessing a motion to dismiss. *See Hill*, 365 N.C. at 275, 715 S.E.2d at 843, (requiring the court, for purposes of a motion to dismiss for insufficient evidence, to consider "all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State"). Additionally, the trial court admitted State's Exhibit 5, a still image taken from the Sheetz Footage showing the suspect outside of the Sheetz bathroom, and State's Exhibit 7, a known image of Defendant.

¶ 29 The evidence admitted at trial, viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference, tended to show: Mitchell purchased his catering trailer for approximately $3,500 in 2014. Mitchell parked the trailer on a lot next to a Sheetz gas station in Louisburg, North Carolina. Mitchell last saw the trailer around 1 August 2016. On the night of 25 August 2016, an extended-cab silver truck pulled up to the front of the Sheetz. Defendant exited the truck, walked into the Sheetz, and went into the bathroom. After a few minutes, Defendant returned to the truck. Defendant drove the truck towards the exit of the Sheetz parking lot, braked, and backed up to the

1. The trial court was consequently permitted to consider the Sheetz Footage in ruling on Defendant's motion to dismiss, despite the subsequent inconsistent instruction that the jury was to consider the Sheetz Footage only for illustrative purposes.

adjacent property where Mitchell's trailer was parked. A few minutes later, Defendant drove the truck away with the trailer in tow.

¶ 30 Defendant argues that the evidence cannot support his felony larceny conviction because it shows only that Defendant had the opportunity to take the trailer. It is true "that a conviction cannot be sustained if '[t]he most the State has shown is that defendant had been in an area where he could have committed the crimes charged.' " *Campbell*, 373 N.C. at 221, 835 S.E.2d at 848 (quoting *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976)). But crediting the in-court identifications and giving the State the benefit of every reasonable inference, a rational juror could conclude that Defendant was the sole occupant and driver of the truck and, without Mitchell's consent, hitched Mitchell's trailer—valued at over $1,000—to the truck and drove away with the trailer in tow, intending to deprive Mitchell of it permanently. Accordingly, substantial evidence of each element of felony larceny and Defendant's identity as the perpetrator was presented. The trial court did not err by denying Defendant's motion to dismiss.

C. Restitution Order

¶ 31 **[3]** Defendant argues that the trial court erred in ordering restitution because it failed to consider Defendant's ability to pay. Though Defendant did not object to the award of restitution before the trial court, "a defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review." *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777-78 (2010) (citations omitted); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2019).

¶ 32 "When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question." N.C. Gen. Stat. § 15A-1340.34(a) (2019).

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters.

N.C. Gen. Stat. § 15A-1340.36(a) (2019).

¶ 33 "A trial court's judgment ordering restitution must be supported by evidence adduced at trial or at sentencing." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (quotation marks and citation omitted). "[T]he award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal." *State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704 (2018) (citations omitted). "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *Id.* at 98, 811 S.E.2d at 705.

¶ 34 During trial, Mitchell testified that he had paid "[s]omewhere in the vicinity of $3500" for the trailer. The trial court was also informed, prior to ordering restitution, that Defendant was near the end of an active sentence and therefore unable to currently earn, Defendant has two children to support upon his release, and Defendant "plan[s] to go back to school and get a trade once he leaves from custody." Defendant also filed an affidavit of indigency reflecting that he was in custody and had zero assets and zero liabilities as of 22 May 2019.

¶ 35 Given the information presented to the trial court, the amount of restitution ordered, and the terms of its payment, the trial court did not fail to consider Defendant's financial resources as required by section 15A-1340.36(a) and thus, did not abuse its discretion. *See State v. Tate*, 187 N.C. App. 593, 597-98, 653 S.E.2d 892, 896 (2007) (finding sufficient consideration of defendant's financial resources where the trial court was presented with an affidavit of indigency and "was aware of defendant's age, employment situation, and living arrangements"); *State v. Person*, 187 N.C. App. 512, 531, 653 S.E.2d 560, 572 (2007) (The "relatively modest amount of restitution and the terms of its payment are not such as to lead to a 'common sense' conclusion that the trial court did not consider defendant's ability to pay."), *rev'd on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

IV. Conclusion

¶ 36 Because Wheeless had general familiarity with Defendant, the trial court did not err in permitting him to identify Defendant as the individual depicted in the Sheetz Footage. Though the trial court erred in permitting the State's other three witnesses to identify Defendant, in light of the other evidence presented, the trial court did not plainly err. The trial

court did not err in denying Defendant's motion to dismiss, and did not abuse its discretion in ordering Defendant to pay restitution.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges TYSON and CARPENTER concur.

ESTATE OF ANTHONY FAZZARI BY RUTH FAZZARI, EXECUTRIX; AND RUTH FAZZARI, PLAINTIFFS

v.

NEW HANOVER REGIONAL MEDICAL CENTER; WILMINGTON HEALTH, PLLC; SEJAL S. PATEL, M.D. AND JOSHUA D. DOBSTAFF, M.D., DEFENDANTS

No. COA20-473

Filed 1 June 2021

Medical Malpractice—pleadings—Rule 9(j)—standard-of-care expert—active clinical practice or instruction—review of all medical records

In a wrongful death case, where defendant doctors knew about decedent's low blood platelet count when he was hospitalized but neither discontinued his Heparin prescription (which can reduce one's platelet count) nor did anything else to mitigate the issue, the trial court properly dismissed plaintiffs' complaint under Civil Procedure Rule 9(j). Plaintiffs could not have reasonably expected their proffered expert to qualify as a standard-of-care expert under Evidence Rule 702(b)(2) where, in the year prior, the expert worked as a medical director of a community blood center, and therefore had not devoted a majority of his time to active clinical practice or the instruction of students in the same or similar health profession as defendants. Further, the expert only reviewed twenty-five percent of decedent's relevant medical records, which did not include records from the five days leading up to decedent's death.

Appeal by plaintiffs from orders entered 7 January 2020 and 13 January 2020 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 28 April 2021.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A. T. Huston, for plaintiffs-appellants.

Harris, Creech, Ward & Blackerby, P.A., by R. Brittain Blackerby and Terra N. Johnson, for defendant-appellee New Hanover Regional Medical Center.

Walker, Allen, Grice, Ammons, Foy & Klick, LLC, by Jerry A. Allen, Jr., and Louis F. Foy, III, for defendants-appellees Wilmington Health, PLLC, Sejal S. Patel, M.D., and Joshua D. Dobstaff, M.D.

ARROWOOD, Judge.

¶ 1 The Estate of Anthony Fazzari by Ruth Fazzari, Executrix, and Ruth Fazzari (collectively, "plaintiffs") appeal from the trial court's orders granting all defendants'[1] (1) motions to dismiss; (2) motions to exclude plaintiffs' sole testifying and standard-of-care expert witness; and (3) summary judgment motions. For the following reasons, we affirm the trial court's order entered 7 January 2020 granting defendants' motions to dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure.

I. Background

¶ 2 At all times relevant, Anthony Fazzari ("decedent") was a 77-year-old man with a history of multiple myeloma and myelodysplastic syndrome. Decedent had been periodically admitted to defendant New Hanover Regional Medical Center ("NHRMC") for neutropenic fever and other complications related to multiple myeloma and myelodysplastic syndrome.

¶ 3 On 12 April 2016, NHRMC admitted decedent to the care of defendant Sejal S. Patel, M.D. ("Dr. Patel"), who noted that decedent presented signs of neutropenic fever and had the condition of "pancytopenia: chronic"—too few red blood cells, white blood cells, and platelets. Dr. Patel prescribed decedent 5,000 units of Heparin[2] every eight hours as a deep vein thrombosis ("DVT") prophylactic.[3] Defendant Joshua D. Dobstaff, M.D. ("Dr. Dobstaff"), another provider for decedent at the time, was allegedly aware of decedent's depressed platelet count but

1. We will refer to all named defendants collectively unless otherwise noted.

2. Heparin may reduce one's platelet count.

3. Plaintiffs allege that at the time of decedent's admission, his platelet count was "depressed indicating that Heparin as a DVT prophylaxis was an inappropriate course of treatment, particularly in light of pending chemotherapy which would further depress platelet counts."

did not take any action to mitigate the issue. At all times relevant, Drs. Dobstaff and Patel were employed by defendant Wilmington Health, PLLC, and practicing as hospitalists when they provided inpatient care to decedent at NHRMC.

¶ 4 On the evening of his admission, blood testing indicated that decedent's platelet count was 24 K/uL, far below NHRMC's target level of 50 K/uL. Given decedent's low platelet count, a secure electronic message was sent to David Schultz, M.D. ("Dr. Schultz"), regarding "critical lab value – Platelets 24" and for "review case."[4] Notwithstanding the above, decedent was administered the previously prescribed dose of Heparin later that night. Thereafter, at 5:44 a.m. on 13 April 2016, decedent's platelet count had dropped from 24 K/uL to 18 K/uL. Notwithstanding this decrease, the orders for Heparin were not discontinued. Plaintiffs allege that after reviewing the lab results reflecting the decrease in decedent's platelet count, neither Dr. Dobstaff nor Dr. Patel changed any orders (including the Heparin prescription) and failed to take any other action to restore decedent's platelet count to target level. However, during the afternoon of 13 April 2016, a nurse refrained from administering the scheduled dose of Heparin noting in decedent's medical record that his platelet count was 18 K/uL.

¶ 5 At 3:42 a.m. on 14 April 2016, decedent's blood was again collected, and his platelet count was determined to be 20 K/uL. Shortly thereafter, decedent complained of a headache and requested medication. In light of these events, a NHRMC care provider sent another secured message to Dr. Schultz stating that decedent appeared confused, impulsive, disoriented, and was exhibiting slurred speech. It is unclear whether Dr. Schultz or any other hospitalists responded to or received these messages; plaintiffs allege that NHRMC did not have the correct information on file for these secure electronic messages which prevented the listed physician in the system from receiving the messages as he or she was not on call to receive or respond to the communications.

¶ 6 Later, a physician's assistant was notified about decedent's deteriorating condition. The Heparin order was discontinued approximately two hours later, around noon on 14 April 2016, and platelet therapy was initiated. After the initiation of platelet therapy, decedent began showing signs of stroke with a diagnosis of Acute Brain Hemorrhage or Intracerebral Hemorrhage ("ICH"). A computerized tomography scan was ordered, and the imaging confirmed that decedent was suffering

4. Dr. Schultz is not a defendant in this case. Also, it is unclear whether there was any response to this secure electronic message.

from an ICH. While decedent's platelet count had improved from the platelet therapy and blood transfusions, decedent was not an operative candidate for the ICH pressure. Decedent was then transferred to the Intensive Care Unit ("ICU") where he was treated until 20 April 2016, when decedent eventually succumbed to the ICH.

¶ 7 On 21 September 2017, plaintiffs filed a complaint against all defendants asserting claims for (1) professional negligence/wrongful death, (2) negligent infliction of emotional distress, and (3) loss of consortium. Pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, plaintiffs certified that all of the medical records pertaining to defendants' negligence had been reviewed by a person who was reasonably expected to qualify under Rule 702 of the North Carolina Rules of Evidence.

¶ 8 On 30 May 2018, plaintiffs served responses to NHRMC's interrogatories. Plaintiffs' responses identified Arnold Rubin, M.D. ("Dr. Rubin"), as plaintiffs' Rule 9(j) expert. On 2 July 2019, plaintiffs served their designation of experts; plaintiffs' designation of experts likewise identified Dr. Rubin as plaintiffs' sole Rule 9(j) expert.

¶ 9 Defendants deposed Dr. Rubin on 5 November 2019. Following Dr. Rubin's deposition, defendants Wilmington Health, PLLC, Dr. Patel, and Dr. Dobstaff filed a motion to exclude Dr. Rubin from testifying as a standard-of-care expert pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure, Rule 702 of the North Carolina Rules of Evidence, N.C. Gen. Stat. § 90-21.12, and other applicable law. These same defendants contemporaneously filed a motion to dismiss pursuant to "Rule 9, Rule 12, Rule 37, Rule 41 and Rule 56 of the North Carolina Rules of Civil Procedure" on the grounds that plaintiffs "failed to comply with the requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure." NHRMC filed practically identical motions on 25 September 2019. The trial court heard oral argument on all motions on 2 December 2019.

¶ 10 Following the hearing, the trial court took the motions under advisement and subsequently granted all motions by entering the following orders: (1) "Order Granting Motions of All Defendants to Dismiss Pursuant to Rule 9(j)" on 7 January 2020; (2) "Order Granting Motions of All Defendants to Exclude Plaintiff's Standard of Care Expert Witness Dr. Arnold Rubin" on 13 January 2020; and (3) "Order Granting Motions of All Defendants for Summary Judgment" on 13 January 2020. Plaintiffs filed a notice of appeal of all three orders on 28 January 2020.

¶ 11 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

A. Rule 9(j) Certification

¶ 12 Because compliance with Rule 9(j) presents a question of law, this Court reviews whether the trial court properly dismissed a complaint under Rule 9(j) *de novo*. *Est. of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citation omitted).

¶ 13 In a medical malpractice suit, a "plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998) (citation omitted). "Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (citations omitted).

¶ 14 Rule 702 of the North Carolina Rules of Evidence governs the admission of expert testimony and states that a medical expert witness may qualify to give expert testimony as to the appropriate standard of care only if the person (1) is a licensed health care provider; (2) specializes in the same specialty or similar specialty as the party against whom the testimony is offered; and (3) during the year immediately preceding the date of the occurrence that is the basis for the action, devoted a majority of his time to the active clinical practice of the same health profession in which the party against whom the testimony is offered or the instruction of students in the same health profession in which the party against whom the testimony is offered. N.C. R. Evid. 702(b)(1)-(2). When the requirements of Rule 702 are satisfied, the trial court must then determine whether the expert is "familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources." *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004) (citation and quotation marks omitted) (quoting another source).

¶ 15 Rule 9(j) of the North Carolina Rules of Civil Procedure requires that any complaint alleging medical malpractice by a health care provider that fails to comply with the applicable standard of care shall be dismissed unless:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care . . . .

N.C. R. Civ. P. 9(j)(1). Failure to adhere to the strict expert requirements set out in Rule 9(j) necessarily leads to dismissal. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002). Moreover, it is well settled that "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

¶ 16 In the case at hand, plaintiffs could not have reasonably expected Dr. Rubin to qualify as an expert witness under Rule 702 such that he could proffer testimony that the medical care provided to decedent did not comply with the applicable standard of care. *See* N.C. R. Civ. P. 9(j)(1). Rule 9(j) incorporates by reference Rule 702(b) of the North Carolina Rules of Evidence, which permits a medical expert witness to give expert testimony as to the appropriate standard of care only if the person (1) is a licensed health care provider; (2) specializes in the same specialty or similar specialty as the party against whom the testimony is offered; and (3) during the year immediately preceding the date of the occurrence that is the basis for the action, devoted a majority of his time to the active clinical practice or the instruction of students in the same health profession in which the party against whom the testimony is offered. N.C. R. Civ. P. 9(j)(1); N.C. R. Evid. 702(b)(1)-(2). Per Rule 702(b), the appropriate standard of care to which the expert must reasonably be expected to testify is defined in N.C. Gen. Stat. § 90-21.12, which provides the following:

> [I]n any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession

> with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12(a) (2019). Thus, plaintiffs must not only reasonably expect the putative expert witness to qualify under Rule 702(b), but they must also reasonably expect the witness to be able to testify as to the applicable standard of care set out in N.C. Gen. Stat. § 90-21.12(a). While the putative expert is not required to have practiced in the same community as defendant, the "witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities." *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672 (citations omitted).

¶ 17 Here, plaintiffs could not have reasonably expected Dr. Rubin to qualify as an expert in this medical malpractice case for at least two reasons. We discuss each issue in turn.

B. Rule 702(b)(2) of the North Carolina Rules of Evidence

¶ 18 First, plaintiffs could not have reasonably believed that during the year immediately preceding the date of the occurrence that is the basis for this action, Dr. Rubin devoted a majority of his professional time to the active clinical practice of the same or similar health profession of Drs. Patel and Dobstaff (Internal and Hospitalist Medicine). Nor could plaintiffs have reasonably believed that from April 2015 to April 2016, Dr. Rubin devoted a majority of his professional time to the instruction of medical students or residents in Internal and Hospitalist Medicine. During his November 2019 deposition, Dr. Rubin confirmed that he retired from active clinical practice in 2013 and became a professor *emeritus* at Rutgers University thereafter. His teaching responsibilities included a monthly lecture to fellows training in hematology and oncology, one yearly lecture to first-year medical students, and "occa-

sional lectures to other students[.]" Notwithstanding the value of these teachings, it is clear that during the year immediately preceding the date of the occurrence that is the basis for this action (*i.e.*, April 2016), Dr. Rubin did not devote a majority of his professional time to the active clinical practice of the same or similar health professions of Drs. Patel and Dobstaff or to the instruction of medical students or residents in the same or similar specialty areas as Drs. Patel and Dobstaff. Indeed, in the year preceding the events giving rise to this action, Dr. Rubin served as the medical director of a community blood center—a non-teaching position. Thus, it is clearly evident that Dr. Rubin did not devote a majority of his professional time to the instruction of *any* students or residents during the year preceding this case. In short, the trial court properly dismissed plaintiffs' complaint pursuant to Rule 9(j) as plaintiffs could not have reasonably expected Dr. Rubin to satisfy the requirement of Rule 702(b)(2) that he devote a majority of his professional time to the active clinical practice or instruction of students or residents in the same or similar health professions as Drs. Patel and Dobstaff. Because Dr. Rubin does not meet the practice-instruction requirement, we need not address the remaining requirements of Rule 702.

C. Review of Medical Records

¶ 19 In addition to plaintiffs' expert's failure to satisfy Rule 702(b)(2), the Rule 9(j) certification is defective in at least one other respect. Rule 9(j) requires certification in the operative pleading that "all medical records pertaining to the alleged negligence . . . have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 . . . ." N.C. R. Civ. P. 9(j)(1). Plaintiffs' putative expert, Dr. Rubin, admittedly reviewed only twenty-five percent of the relevant medical records related to decedent's April 2016 admission at NHRMC. It is undisputed that Dr. Rubin examined only the medical records related to decedent's admission at NHRMC between 12 April 2016 and 14 April 2016. He did not review any medical records for treatment and care between 15 April 2016 and 20 April 2016, the date of decedent's death, although such documents were available to plaintiffs. Therefore, the trial court properly ruled that plaintiffs failed to comply with Rule 9(j). *See Fairfield v. WakeMed*, 261 N.C. App. 569, 574, 821 S.E.2d 277, 281 (2018) ("Allowing a plaintiff's expert witness to selectively review a mere portion of the relevant medical records would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality. Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff's attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant.").

¶ 20 Moreover, we disagree with plaintiffs' assertion that medical records dated after 14 April 2016 do not "pertain to the alleged negligence." Plaintiffs aver in their September 2017 complaint that after 14 April 2016, decedent's platelet count "improved significantly with the platelet therapy and blood transfusions." Plaintiffs assert that after 14 April 2016, decedent was treated in the ICU with platelet therapy and medications until his death on 20 April 2016. Certainly records reflecting any actions taken by defendants or their agents in the days after the discontinuation of Heparin and the days before decedent's death would be highly relevant and important to an expert's opinion on the matter. Thus, we find that medical records from 14 April 2016 through 20 April 2016 are highly relevant and material to the alleged negligence. Because said records were not reviewed by Dr. Rubin, we affirm the trial court's conclusion that plaintiffs failed to satisfy the substantive pre-filing requirement of Rule 9(j) that Dr. Rubin review all medical records pertaining to the alleged negligence that were reasonably available to plaintiffs.

¶ 21 Because plaintiffs could not have reasonably believed that Dr. Rubin would qualify to testify as an expert under Rule 702 as he had not been actively practicing or teaching in the year prior to his designation, and because Dr. Rubin failed to review all medical records pertaining to the alleged negligence that were available to plaintiffs, and in light of the fact that Dr. Rubin was plaintiffs' sole expert witness, the trial court properly dismissed plaintiffs' complaint pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. *See Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673 (holding that exclusion of sole expert witness rendered plaintiff unable to establish essential element of malpractice claim and thus warranted judgment in favor of defendants).[5]

III. Conclusion

¶ 22 For the foregoing reasons, we affirm the trial court's order entered 7 January 2020 dismissing plaintiffs' complaint for failure to comply with the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges DILLON and WOOD concur.

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5. In light of our holding affirming the Rule 9(j) dismissal, we need not reach plaintiffs' remaining arguments nor review the trial court's additional orders.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 JUNE 2021)

ASCENDUM MACH., INC. v. KALEBICH 2021-NCCOA-238 No. 20-579	Mecklenburg (19CVS9596)	Affirmed
BRADLEY v. CITY OF FAYETTEVILLE 2021-NCCOA-239 No. 20-525	Cumberland (19CVS4382)	Affirmed
CHEEK-TAROUILLY v. STANHISER 2021-NCCOA-240 No. 20-150	Durham (19CVD500121)	Affirmed
FAM. INNOVATIONS, LLC v. CARDINAL INNOVATIONS HEALTHCARE SOLUTIONS 2021-NCCOA-241 No. 20-681	Mecklenburg (19CVS1265)	Affirmed
FRENCH-DAVIS v. THE SHOPS AT CAMERON PLACE, LLC 2021-NCCOA-243 No. 20-664	Lee (18CVS431)	Affirmed
IN RE A.L.P. 2021-NCCOA-244 No. 20-629	Yancey (19JB30)	Reversed and Remanded
IN RE N.B. 2021-NCCOA-245 No. 21-38	McDowell (15JA41) (18JA12) (18JA51)	Vacated and Remanded
IN RE N.C. 2021-NCCOA-246 No. 21-54	Wayne (20JA36)	Affirmed.
IN RE N.L.G. 2021-NCCOA-247 No. 21-56	Alexander (20JB4)	Reversed and Remanded
IN RE W.A. 2021-NCCOA-248 No. 20-808	Cumberland (18JA191)	Affirmed

PISTONE v. HELBERG 2021-NCCOA-249 No. 20-484	Iredell (15CVD2107)	Dismissed
POSTAL v. KAYSER 2021-NCCOA-250 No. 20-623	Buncombe (18CVS5034)	Affirmed
RADCLIFFE v. AVENEL HOMEOWNERS ASS'N, INC. 2021-NCCOA-251 No. 20-123	New Hanover (13CVS1073)	Affirmed
SOLOMON v. CUNDIFF 2021-NCCOA-252 No. 20-489	Rowan (19CVS1529)	Affirmed
STATE v. ALEXANDER 2021-NCCOA-253 No. 20-315	Haywood (19CRS204-205)	No Error
STATE v. DILLARD 2021-NCCOA-254 No. 20-631	Rowan (18CRS50589-91) (18CRS50608) (18CRS50733) (18CRS50740)	Affirmed.
STATE v. FINNEY 2021-NCCOA-255 No. 20-354	Cleveland (18CRS595)	No Error
STATE v. FLOYD 2021-NCCOA-256 No. 20-454	Cumberland (17CRS061578)	No Error.
STATE v. McKOY 2021-NCCOA-257 No. 20-582	Robeson (15CRS51892)	NO ERROR IN PART; VACATED IN PART.
STATE v. MILTON 2021-NCCOA-258 No. 20-414	Forsyth (18CRS55756)	No Error
STATE v. O'NEAL 2021-NCCOA-259 No. 20-375	Pitt (15CRS57830)	No Error
STATE v. PHIFER 2021-NCCOA-260 No. 20-630	Davidson (16CRS55047-48)	Dismissed

STATE v. RAMIREZ 2021-NCCOA-261 No. 20-504	Moore (19CRS458) (19CRS50659)	REVERSED IN PART AND VACATED IN PART.
STATE v. TAYLOR 2021-NCCOA-262 No. 20-509	Wilson (18CRS51704)	AFFIRMED IN PART, DISMISSED IN PART.
STATE v. WILLIAMS 2021-NCCOA-263 No. 20-424	Johnston (19CRS52193-94)	No plain error in part; No error in part.
WILLIAMS v. REARDON 2021-NCCOA-264 No. 20-450	Mecklenburg (18CVS15898)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Appellate jurisdiction—grant of new trial—two grounds—appeal by State dismissed—Where the trial court granted a new trial to a criminal defendant on two separate grounds—ineffective assistance of counsel (IAC) and newly discovered evidence—the State's appeal, brought by filing notice of appeal and not through a petition for writ of certiorari, was dismissed. Since the State had no right to appeal the IAC ground pursuant to N.C.G.S. § 15A-1445(a)(2), it failed to invoke appellate jurisdiction for review of that issue, and because the two grounds were mutually exclusive and not inextricably intertwined, the State's appeal of the other ground was dismissed as moot. **State v. Carver, 89.**

Cross-appeals—Appellate Rule 3—not time-barred—In a medical malpractice case—in which plaintiff filed notice of appeal from multiple orders, including one that granted defendants (including a doctor and a hospital) summary judgment—defendants were not required to file their cross-appeals (challenging the trial court's denial of their respective motions to dismiss) within the general thirty-day window for taking notice of appeal, because they could not have appealed from the challenged orders, which were interlocutory, until the whole case was disposed of. Since defendants' cross-appeals were filed within ten days of plaintiff's notice of appeal and were related to plaintiff's appeal, they were not time-barred pursuant to Appellate Rule 3. **Miller v. Carolina Coast Emergency Physicians, LLC, 449.**

Interlocutory orders—substantial right—risk of inconsistent verdicts—In a condemnation matter in which a town filed a direct condemnation action and later filed a declaratory judgment action, interlocutory orders from the latter proceeding were immediately appealable as affecting a substantial right where both actions involved the same factual issues and there was a risk of inconsistent verdicts, and because the property owner asserted that the doctrine of res judicata prohibited re-litigating the issue of whether the town had title to an easement on her property. **Town of Apex v. Rubin, 357.**

Mootness—public interest exception—habeas corpus petition—continued imprisonment during global pandemic—The public interest exception to the mootness doctrine applied to an appeal from the summary denial of a petition for habeas corpus in which petitioner, who suffered from a respiratory illness, alleged that his continued imprisonment during the global coronavirus pandemic violated both federal and state constitutional guarantees against cruel and unusual punishment. Although petitioner had already been released from prison, a high number of similar petitions had been held in abeyance pending a resolution of petitioner's case, and therefore petitioner's appeal clearly affected "members of the public beyond just the parties in the immediate case." **State v. Daw, 240.**

Preservation of issues—failure to object to same or similar evidence—murder trial—In a murder prosecution, where defendant objected to testimony describing his suspicious behavior a few days after the murder but did not object to the admission of an audio tape of the witness's 911 call, which relayed the same facts included in the witness's testimony, defendant lost the benefit of his objection and, therefore, could not challenge the testimony on appeal. **State v. Washington, 576.**

Preservation of issues—lifetime satellite-based monitoring—waived constitutional argument—Rule 2—In an appeal from an order imposing lifetime satellite-based monitoring (SBM), the Court of Appeals declined to invoke Appellate Rule 2 to review defendant's argument that lifetime SBM amounted to an unreasonable search under the Fourth Amendment. Defendant failed to raise this argument at

APPEAL AND ERROR—Continued

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

selling marijuana to another student, the trial court erred in denying the juvenile's motion to suppress his confession, which was a product of a custodial interrogation requiring *Miranda* warnings and the additional protections afforded juveniles under N.C.G.S. § 7B-2101. Notably, the court relied on an erroneous legal standard where it should have conducted an objective inquiry: whether a reasonable thirteen-year-old in the same circumstances would believe they were not free to leave. **In re D.A.H., 16.**

CONSTITUTIONAL LAW

Due process—competency to stand trial—no determination—defendant subsequently found not guilty by reason of insanity—In an assault case, the trial court violated defendant's constitutional due process rights, and the statutory mandate in N.C.G.S. § 15A-1001(a), by finding defendant not guilty by reason of insanity (NGRI) and ordering him involuntarily committed without first determining whether defendant had capacity to proceed, despite holding a hearing on that issue. **State v. Myrick, 112.**

Effective assistance of counsel—innocence hearing—expungement of DNA records—Where the Department of Adult Corrections took a blood sample from defendant while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database, a three-judge panel in the superior court subsequently dismissed defendant's murder conviction following an innocence inquiry, and the State sought to introduce the DNA evidence at defendant's trial for another murder, the trial court in the second murder prosecution properly rejected defendant's claim that he received ineffective assistance of counsel at his innocence proceedings. Defendant was not entitled to expungement of his DNA records under N.C.G.S. §§ 15A-146 or 15A-148, and therefore his counsel's failure to petition for expungement did not render counsel's performance deficient. **State v. Womble, 164.**

Equal protection—workers' compensation death benefits—marital status—controlling precedent—In a workers' compensation case involving death benefits, where the North Carolina Supreme Court previously interpreted N.C.G.S. § 97-39 as excluding an unmarried woman from receiving compensation (in *Fields v. Hollowell & Hollowell*, 238 N.C. 614 (1953)), the Court of Appeals was without authority to consider the constitutional argument made by decedent's romantic partner that she was deprived of her equal protection rights on the basis of her marital status when she was denied a share of the death benefits because she and decedent were not married. **West v. Hoyle's Tire & Axle, LLC, 196.**

Federal—due process—government's taking and maintenance of DNA sample—criminal case—Where the Department of Adult Corrections took a blood sample from defendant while he was incarcerated for murder and uploaded his DNA profile to the FBI's national DNA database, a three-judge panel in the superior court subsequently dismissed defendant's murder conviction, and defendant moved to suppress his DNA sample at his trial for another murder, the trial court improperly granted defendant's motion. The government's taking and retention of the blood sample did not violate defendant's due process rights under the Fourteenth Amendment of the federal constitution where, as the Court of Appeals had determined, it did not violate defendant's rights under the North Carolina Constitution's "Law of the Land" Clause. Moreover, defendant could not claim a due process violation where he did not pursue the statutory minimum procedure (a petition) for the return of his blood sample. **State v. Womble, 164.**

EVIDENCE—Continued

Expert testimony—admissibility—Rule 702—opinion based on sufficient facts or data—In a medical malpractice case, the trial court erred by disqualifying plaintiff's expert, a practicing emergency room physician, on multiple bases. First, the trial court's exclusion on the basis the expert was not familiar with the standard of care as required by N.C.G.S. § 90-21.12(a) at the time the alleged malpractice occurred was not supported by the record, since the expert did review relevant data about the community and hospital during the pertinent time. Second, the trial court misapplied Evidence Rule 702(a) by concluding that the expert's opinions were not founded on sufficient data (because he had not reviewed certain records). However, questions regarding the basis for the expert's opinions went to the weight and credibility of his testimony and not to admissibility, and the expert was qualified pursuant to Rule 702(b). **Miller v. Carolina Coast Emergency Physicians, LLC, 449.**

Expert testimony—reliability test—detailed findings not required—In an arson prosecution, the trial court properly conducted the Evidence Rule 702 reliability analysis before exercising its discretion to admit the expert testimony of a fire investigator, where the court heard extensive voir dire testimony that covered all three prongs of the reliability test and announced that it had considered the three-prong test; it was not required to make detailed findings addressing each prong. Further, contrary to defendant's argument that the expert used an admittedly unscientific "negative corpus" approach, the expert expressly stated that he did not rely on that approach. **State v. Lance, 627.**

Illustrative—photocopy of check—witness's personal observations—In a prosecution for forgery of a check and uttering a false check, the trial court properly admitted a photocopy of the alleged false check as illustrative evidence of a witness's testimony regarding her personal observation of defendant writing the check. **State v. McSwain, 522.**

Indecent liberties trial—recorded interview with victim—statements by DSS social worker—credibility vouching—In a trial for taking indecent liberties with a child, the trial court did not err by admitting a recorded interview of the child victim by a DSS social worker, during which the social worker said "no kid should ever be put in that situation by an adult" and that "[adults] should know better," because those statements did not impermissibly vouch for the victim's credibility. The statements were made to comfort the victim as she recounted her experiences with defendant and did not constitute an opinion about whether the victim was telling the truth or that a sexual offense had in fact taken place. **State v. Sechrest, 372.**

Indecent liberties trial—text messages between child victim and relative—credibility vouching—In a trial for taking indecent liberties with a child, there was no plain error in the admission of a series of text messages between the child victim and her uncle, in which they discussed defendant's conduct toward the victim, with the uncle describing that conduct as "illegal." The text messages did not have a probable impact on the jury's verdict where the jury was properly instructed on its role in assessing witness credibility, the victim testified extensively at trial, and defendant stated that "maybe things did go a little too far" when referring to the incident that gave rise to the criminal charge. **State v. Sechrest, 372.**

Lay witness identification—surveillance footage—larceny—plain error analysis—In a prosecution for felony larceny, where the State introduced surveillance footage of a man stealing a trailer and where four lay witnesses identified that man as defendant, the trial court erred in admitting three of those identifications into evidence where only one witness was familiar with defendant based on previous dealings

EVIDENCE—Continued

INDICTMENT AND INFORMATION—Continued

separate short-form indictments with identical language for each type of offense, the trial court had jurisdiction over all four charges (as opposed to only one count of each offense). Each indictment complied with N.C.G.S. § 15A-924 (requiring a plain and concise factual statement supporting each element of an offense) and N.C.G.S. § 15-144.2 (allowing the use of short-form indictments for the offenses defendant was charged with), and therefore each indictment was facially valid. Moreover, the plain language of N.C.G.S. § 15A-926(a) does not require the State to join two counts of the same offense in one indictment. **State v. Helms, 96.**

Section 15A-630—untimely notice of indictment—no prejudice—In a prosecution for charges arising from a home break-in, where defendant did not receive the original indictments in the mail and was not served with a superseding indictment until the first day of trial, the trial court's failure to timely "cause notice of the indictment" to be provided to defendant—pursuant to N.C.G.S. § 15A-630—did not amount to reversible error. Section 15A-630 is not jurisdictional, and the error did not prejudice defendant where he had previously signed two waiver of counsel forms acknowledging that he knew the charges against him, stated he was ready to proceed to trial despite receiving late notice of the superseding indictment, was asked (pursuant to N.C.G.S. § 15A-1242) by the trial court whether he understood the charges against him, and had ample opportunity to prepare his defense after viewing surveillance footage of the break-in. **State v. Crudup, 232.**

INJUNCTIONS

Preliminary—condemnation matter—to prevent removal of improper sewer line—likelihood of success on merits—In a condemnation matter in which it was determined that a town's taking of an easement was invalid and that the town's installation of a sewer line across a resident's property did not constitute an inverse condemnation, and where the town was granted a preliminary injunction in its declaratory judgment action to prohibit the resident from removing the sewer line, based on principles of res judicata, there was no likelihood that the town would succeed on the merits of the parts of its claim related to title of the easement and what remedy was available to the resident. Further, the trial court's finding that there were no practical alternatives to the currently installed sewer line was not supported by the record. The Court of Appeals left the preliminary injunction undisturbed, however, since the resident did not rebut the presumption that the town was likely to succeed on the separate issue of whether removal of the pipe was warranted in light of various equitable principles. **Town of Apex v. Rubin, 357.**

INSURANCE

Duty to defend—policy exclusions—willful conduct—comparison of allegations and policy—Where a personal injury law firm was sued for violating federal law by knowingly using protected personal information for advertisements, the law firm's insurance company had no duty to defend the law firm because injury arising out of the willful violation of a penal statute was excluded from the applicable policy's coverage. Because the complaint in the federal lawsuit alleged that the injury was based upon the law firm's "knowing" conduct, and because "knowing" and "willful" mean essentially the same thing, the policy's exclusion for "willful" conduct was triggered. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lanier L. Grp., P.A., 605.**

SATELLITE-BASED MONITORING—Continued

that lifetime SBM constituted an unreasonable search under the Fourth Amendment, or properly file a written notice of appeal from the SBM order in accordance with Appellate Rule 3. Although a constitutional right to effective assistance of counsel is unavailable to defendants in SBM proceedings (which are civil rather than criminal in nature), the statutory right to counsel in SBM proceedings under N.C.G.S. § 7A-451(a)(18) includes the right to effective assistance of counsel. **State v. Spinks, 554.**

Lifetime—imposed without a hearing—The trial court erred by requiring defendant to enroll in satellite-based monitoring (for convictions of second-degree rape and second-degree sexual offense) without holding a hearing on the issue, as required by N.C.G.S. § 14-208.40A. **State v. Mack, 505.**

SEARCH AND SEIZURE

Encounter with police officer—show of authority—in moving vehicles—use of hand gestures to seek communication—Defendant was seized for purposes of the Fourth Amendment when a marked police car followed his vehicle at 3:00 a.m. into an empty parking lot, drew up to defendant's car so the driver's side windows of both vehicles were three to four feet apart, and the officer put his arm out the window and waved his hand up and down to indicate he wanted to speak with defendant. Under these circumstances, no reasonable person would feel free to leave, and defendant's motion to suppress evidence of his intoxication should have been granted. **State v. Steele, 124.**

Exclusionary rule—fruit of poisonous tree—independent source doctrine—DNA sample—In a murder prosecution where defendant moved to suppress his DNA blood sample, which was drawn pursuant to N.C.G.S. § 15A-266.4 while he was incarcerated for a murder conviction (from over forty years ago) that was subsequently dismissed following an innocence inquiry, the exclusionary rule did not preclude the State from introducing the DNA sample, which was not the fruit of illegal police conduct. Defendant failed to show that his confession to the first murder (which resulted in his conviction and, eventually, the blood draw) was obtained through coercion. At any rate, a separate interview with law enforcement provided a lawful, independent source for his confession. **State v. Womble, 164.**

Inevitable discovery doctrine—no temporal component—DNA sample—In a murder prosecution where defendant moved to suppress his DNA blood sample, which was drawn pursuant to N.C.G.S. § 15A-266.4 while he was incarcerated for a murder conviction (from over forty years ago) that was subsequently dismissed, the trial court erred by not allowing the State to present evidence that the DNA sample—even if unconstitutionally seized—was admissible under the inevitable discovery doctrine. Specifically, the trial court improperly excluded an officer's testimony—that the murder investigation would have inevitably focused on defendant in light of certain police incident reports—because the officer learned of defendant's DNA matching to blood at the crime scene before he read the reports. The inevitable discovery doctrine only required that the DNA sample would have inevitably been discovered, regardless of when. **State v. Womble, 164.**

Traffic stop—extended duration—probable cause—presence of drugs in vehicle—In a drug trafficking case, where an officer stopped defendant's car for speeding and a suspected window tint violation, the trial court properly denied defendant's motion to suppress because competent evidence showed the officer had

SEARCH AND SEIZURE—Continued